No. 93-11

In The

Supreme Court of the United States

October Term, 1992

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Robert E. Hanson,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Tax Injunction Act, 28 U.S.C. § 1341, prohibit a state court of competent jurisdiction from entertaining a cause of action under 42 U.S.C. § 1983 in a case involving state taxation?

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Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

PETITION FOR WRIT OF CERTIORARI

Petitioner, Quill Corporation ("Quill"),[1] respectfully prays that a writ of certiorari issue to review the opinion of the North Dakota Supreme Court issued on remand after this Court's decision in *Quill Corporation v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904 (1992). The North Dakota Supreme Court held that the courts of North Dakota may not entertain Quill's cause of action under 42

[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Quill is neither the parent nor the subsidiary of any other company.

U.S.C. § 1983 for deprivation of Quill's Commerce Clause rights.

OPINIONS BELOW

The Opinion of the North Dakota Supreme Court was issued on May 11, 1993, is reported at ___ N.W.2d ___, is unofficially available electronically at 1993 N.D. Lexis 90, and is reprinted in the Appendix ("App.") at App. 1.

The Amended Judgement and Opinion of the North Dakota Supreme Court was issued on July 28, 1992, is reported at 487 N.W.2d 598 (N.D. 1992), and is reprinted in the Appendix at App. 20.

The Opinion of this Court in *Quill Corporation v. North Dakota*, was issued on May 26, 1992, is reported at 504 U.S. ___, 112 S.Ct. 1904 (1992), and is reprinted in the Appendix at App. 24.

The Opinion of the North Dakota Supreme Court was issued on May 7, 1991, is reported at 470 N.W.2d 203 (N.D. 1991), and is reprinted in the Appendix at App. 68.

The Opinion of the District Court for the South Central Judicial District, County of Burleigh, State of North Dakota, Judge Benny Graff presiding, was issued on May 15, 1990, is unofficially reported in CCH, *North Dakota State Tax Reporter*, Vol. 2, ¶ 200-376, and is reprinted in the Appendix at App. 111.

JURISDICTION

The Opinion of the North Dakota Supreme Court was issued on May 11, 1993. No rehearing was requested. The jurisdiction of this Court to review the decision of the North Dakota Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

United States Constitution, Article VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary.

28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 (last sentence):

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

N.D. Century Code § 32-23-01:

A court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.

STATEMENT OF THE CASE

In *Quill Corporation v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904 (1992), the Court held that North Dakota's imposition of use tax collection responsibility on Quill was prohibited by the Commerce Clause of the United States Constitution. On remand, the North Dakota Supreme Court addressed Quill's claim that this violation of its rights secured by the Commerce Clause gave it a cause of action under 42 U.S.C. § 1983. The North Dakota Supreme Court concluded that the courts of North Dakota may not entertain Quill's § 1983 cause of action. It is this refusal to entertain Quill's § 1983 cause of action which Quill requests this Court to review.[2]

Proceedings Below

Effective July 1, 1987, North Dakota adopted legislation making mail order companies such as Quill liable to collect and remit North Dakota use tax. On July 7, 1989, the State of North Dakota, through its Tax Commissioner, filed an original action in District Court under North Dakota's Declaratory Judgment Act, N.D.C.C. § 32-23-01, requesting the court to declare that Quill was obligated to collect and remit use tax and to hold Quill liable for use tax, plus interest and penalties, retroactive from July 1, 1987. App. 116.

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[2] The substantive tax issues of this case are fully described in the Court's prior opinion. The discussion which follows is limited to those parts of the proceedings below which are relevant to the question of the North Dakota courts' obligation to hear and decide Quill's claim under 42 U.S.C. § 1983.

Quill answered, claiming that it was not obligated to collect and remit use tax based on this Court's decision in *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). Quill also filed a counterclaim against the State and the Tax Commissioner, in her official capacity,[3] under 42 U.S.C. § 1983. App. 123. Quill alleged that the imposition of use tax collection responsibility violated Quill's rights secured by the Due Process Clause and Commerce Clause of the United States Constitution. Quill prayed for a declaration that North Dakota and the Tax Commissioner had deprived Quill of its constitutional rights within the meaning of 42 U.S.C. § 1983. App. 132. Quill also requested an award of attorneys fees under 42 U.S.C. § 1988. The Tax Commissioner answered Quill's counterclaim by asserting that the § 1983 claim against her in her official capacity was barred by the Eleventh Amendment and the doctrine of Sovereign Immunity. App. 139.

In a memorandum decision, the District Court found that North Dakota could not require Quill to collect and remit use tax, finding this Court's decision in *National Bellas Hess* to be controlling. The District Court, without explanation, denied Quill's counterclaim based upon § 1983.

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[3] Quill agrees that the State of North Dakota is immune from suit under § 1983. However, a state officer is liable if sued in his or her official capacity for injunctive or declaratory relief. *Will v. Michigan Department of State Police*, 491 U.S. 58, at 71, n.10 (1989).

The Tax Commissioner of North Dakota at the time of suit was Heidi Heitkamp. She has been succeeded by Robert E. Hanson and the North Dakota Supreme Court substituted Mr. Hanson as a party in this case.

The North Dakota Supreme Court reversed the District Court and held that Quill was obligated to collect and remit use tax under the 1987 legislation and remanded the case for entry of judgment in favor of the State on all claims. Because of its disposition, the court did not reach Quill's § 1983 claim.

The Court granted Quill's Petition for Writ of Certiorari and reversed the decision of the North Dakota Supreme Court. The Court held that the Commerce Clause prohibits North Dakota from imposing use tax collection and payment obligations on Quill because it lacks a physical presence in North Dakota. The Court remanded the case to the North Dakota Supreme Court for further proceedings.

On remand, the North Dakota Supreme Court initially entered an Amended Judgement and Opinion holding that Quill was not obligated to collect and remit North Dakota use tax but, without explanation, denied Quill's claim based upon § 1983. App. 23.

Quill filed a petition for rehearing from that part of the Amended Judgement and Opinion which denied Quill's § 1983 claim. The petition was granted, and the North Dakota Supreme Court subsequently issued the opinion which is the subject of this Petition for Writ of Certiorari.

The North Dakota Supreme Court's Opinion

The North Dakota Supreme Court characterized the positions of the parties on the § 1983 issue as follows:

> The State argued that this case is controlled by *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), in which we held that taxpayers could not bring a § 1983 action in state court to enjoin the assessment of state taxes if there was an adequate remedy available under state law. Quill argues that the rationale underlying *Linderkamp* has been rejected by the United State Supreme Court in *Howlett v. Rose*, 496 U.S. 356 (1990).

App. 3. The court then reviewed this Court's opinion in *Howlett*. The court first described the *Howlett* decision as follows:

> The Court is merely saying that federal law is binding on the states, and that state courts do not have discretion to refuse to hear federal causes of action.

App. 9. The court went on to say that *Howlett* stood for the proposition that:

> [T]he Supremacy Clause precludes state courts from applying state procedural rules that would necessarily produce a different result than if the case had been brought in federal court.

App. 9. Based upon this reading, the court refused to find that *Howlett* required the North Dakota courts to entertain Quill's cause of action under § 1983.

The court, citing *Howlett*, *Felder v. Casey*, 487 U.S. 131 (1988), and *Wilson v. Garcia*, 471 U.S. 261 (1985), stated that this Court has expressed a strong preference for uniformity of result in § 1983 cases, whether brought in federal or state courts. The court concluded that uniformity was preserved by refusing to hear Quill's § 1983

cause of action in state court when the same action could not be brought in federal court. App. 10.

The court observed that its refusal to entertain Quill's § 1983 cause of action found support in a number of other state court decisions. The court cited *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), and *Greenwich Township v. Murtagh*, 601 A.2d 1352 (Pa. Commw.), *appeal granted*, 606 A.2d 904 (Pa. 1992). App. 11-12.

Finally, the court stated that its decision was based on federal law and policy. The court stated that the enactment of the Tax Injunction Act reflected a congressional policy of federal non-interference in state tax administration. Following *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992), the court held that the federal policy of non-interference supported its refusal to permit Quill to bring a § 1983 cause of action in state court. App. 15.

REASONS FOR GRANTING THE PETITION

The North Dakota Supreme Court's refusal to hear Quill's § 1983 claim raises a substantial federal question. *Howlett*, 496 U.S., at 366. The obligation of state courts to entertain § 1983 claims is at issue in an increasing number of state tax cases. Eight state courts of last resort have issued directly conflicting decisions on this question.

This division among the state courts is most recently demonstrated by the decision of the North Dakota Supreme Court in this case and the decision of the Tennessee Supreme Court in *Bloomingdale's by Mail Ltd. v.*

Huddleston, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, ___ S.Ct. ___, June 21, 1993. The Tennessee Supreme Court held that *Howlett* requires the Tennessee courts to entertain taxpayers' § 1983 claims, the argument rejected by the North Dakota Supreme Court below. This Court denied the Tennessee Commissioner of Revenue's Petition for Writ of Certiorari on June 21, 1993.

Six other state courts of last resort have addressed the question of whether their courts must hear § 1983 claims in state tax cases. Four courts have accepted the arguments adopted by the North Dakota Supreme Court below and held that the state courts may not hear § 1983 claims in state tax cases. *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), aff'd by an equally divided Court, 471 U.S. 82 (1985) (*per curiam*); *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Zizka v. Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985); and *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985).

In contrast, the Mississippi Supreme Court, in *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So. 2d 1333 (Miss. 1987), and the Kansas Supreme Court, in *Allison v. Board of County Commissioners of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987) held that their state courts were required to hear taxpayers' § 1983 claims. These decisions hold that the Tax Injunction Act does not permit the state courts to refuse to entertain such claims.[4]

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[4] This question has also been the subject of a number of law review articles, which have concluded that the state courts are obligated to entertain § 1983 claims in state tax cases. Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Note, *Does the Tax*

This Court has not explicitly answered the question raised in *Quill* and the other cases cited above. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, at 234 (1987). More recently, Justice Kennedy stated in his dissent in *Dennis v. Higgins*, 498 U.S. 439 (1991), that as a consequence of the Court's holding that Commerce Clause violations are cognizable under § 1983, the question of the obligation of state courts to hear § 1983 claims in state tax cases is of "paramount importance". 498 U.S., at 465. The question raised in this case is ripe for review. This Court should grant Quill's Petition and hold that state courts of competent jurisdiction are obligated to entertain causes of action under § 1983 in cases involving state taxation.

The decision of the North Dakota Supreme Court is contrary to the fundamental principles of state court jurisdiction to hear federal causes of action. In *Howlett*, this Court explained the obligation of state courts to enforce federal law:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy

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Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?, 45 Wash. & Lee L. Rev. 381 (1988); and Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

> Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

496 U.S., at 367. The only limitations on this obligation which the Court recognized in *Howlett* are cases over which Congress has explicitly ousted the state courts from jurisdiction and certain "valid excuses" based on neutral principles of state court procedure, i.e. principles which apply to both state and federal claims. Neither limitation applies in this case.

The Tax Injunction Act Does Not Oust the State Courts From Jurisdiction Over § 1983 Claims in State Tax Cases

The Court has frequently observed that Congress intended concurrent federal and state court jurisdiction over claims based on § 1983. *Martinez v. California*, 444 U.S. 277, at 283 (1980); *Patsy v. Florida Board of Regents*, 457 U.S. 496, at 506-507 (1982); and *Felder v. Casey*, 487 U.S. 131, at 147 (1988). *Howlett*, of course, went on to hold that state court jurisdiction is mandatory absent congressional ouster or a "valid excuse". The adoption of the Tax Injunction Act did not oust the state courts from jurisdiction over § 1983 claims in state tax cases.

The standards for determining whether Congress has ousted states from jurisdiction over federal causes of action were recently restated in *Tafflin v. Levitt*, 493 U.S. 455 (1990). The Court, quoting *Gulf Offshore Co. v. Mobil Oil Corp.* 453 U.S. 473 (1981), stated:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state

> courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. 453 U.S., at 478 (citations omitted).

493 U.S., at 459-460. It is clear, and the North Dakota Supreme Court admits, that the explicit language of the Tax Injunction Act does not divest the state courts from jurisdiction over § 1983 claims in state tax cases. App. 4. The language of the Tax Injunction Act is directed solely at the jurisdiction of the federal courts.

Similarly, there is nothing in the legislative history of the Tax Injunction Act which by "unmistakable implication" ousts the state courts from jurisdiction over § 1983 claims in state tax cases. That history and this Court's decisions reviewing that history, e.g. *Fair Assessment in Real Estate Ass'n., Inc. v. McNary*, 454 U.S. 100 (1981), provide no indication that Congress even considered the possible application of the Tax Injunction Act to restrict state court jurisdiction. The sole focus was on federal court jurisdiction. Thus, if the enactment of the Tax Injunction Act can be said to oust the state courts from jurisdiction over § 1983 cases such as Quill's, this ouster can only be based on a "clear incompatibility between state-court jurisdiction and federal interests." There is no such incompatibility.

The federal interest expressed in the Tax Injunction Act was to limit federal *court* interference with state tax

administration. In *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), the Court explained:

> The statute "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. [68,] at 73 [(1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone). . . .

450 U.S., at 522. The North Dakota Supreme Court argues that requiring state courts to hear § 1983 claims in state tax cases will be as disruptive of state tax administration as permitting similar suits in federal court. App. 15. This argument fundamentally mischaracterizes the impact of § 1983 claims on state tax administration.

Section 1983 does nothing more than give a taxpayer a cause of action for violation of its rights secured by the Constitution or the laws of the United States. *Fair Assessment in Real Estate*, 454 U.S., at 103. It does not affect state tax procedures either at the administrative or judicial level. The taxpayer must still exhaust administrative procedural remedies before bringing its § 1983 claim in state court. *Fair Assessment in Real Estate*, 454 U.S., at 133 (Brennan, J., concurring).[5]

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[5] State courts have generally required exhaustion of administrative remedies before the taxpayer may bring a § 1983 claim. See, e.g., *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992).

The claimant under § 1983 is also subject to the normal procedural rules of the state courts. As the Court said in *Howlett*:

> The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, 54 Colum. L. Rev., at 508; see also *Southland Corp. v. Keating*, 465 U.S. 1, 33 (1984) (O'Connor, J.. dissenting); *FERC v. Mississippi*, 456 U.S., at 774 (opinion of Powell, J.).

496 U.S., at 372. What this Court said in *Howlett* when discussing the Federal Employers' Liability Act, is equally applicable to § 1983:

> Congress had not attempted "to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure."

496 U.S., at 373. A § 1983 claim does not enlarge, regulate or interfere with state tax administration and court procedures.

Section 1983 also does not provide any new or different remedies than would be available for claims based on state law. Quill is entitled to request declaratory relief because North Dakota law authorizes actions for declaratory relief in state tax cases. N.D.C.C. § 32-23-01. Absent such a state procedure Quill would be limited to other remedial procedures authorized by state law.

Except for the potential award of attorneys fees, requiring the state courts to hear claims under § 1983 will have no more impact on state tax administration than requiring the courts to hear claims based on other federal

statutes imposing substantive restrictions on state taxing powers. Congress has enacted at least forty six (46) separate laws limiting the states' taxing powers.[6] Each can be said to interfere with a state's power of taxation. Each restriction is also routinely enforced in state court without objection by the states.

In the end, the North Dakota Supreme Court's major concern is not that the state courts must entertain § 1983 causes of action but that they must award attorneys fees to the prevailing taxpayer under 42 U.S.C. § 1988. This is the primary federal "interference" to which the court objects. That objection is misplaced. Fees will be awarded only when the taxpayer sustains a claim that its federal constitutional or statutory rights have been violated. This will not threaten the states' fiscal autonomy or tax administration.

At least 33 states have authorized the award of attorneys fees in state tax cases.[7] The Tennessee attorneys fee statute described in *Bloomingdale's* is illustrative. If the award of fees under state law does not interfere with or threaten the states' tax collection systems, surely the potential for an award of attorneys fees as the result of violating a taxpayer's federal rights is no threat.

In sum, Congress has not ousted the state courts from their concurrent jurisdiction under § 1983. The existence of the Tax Injunction Act and the principles which it expresses are in no way violated or threatened by requiring the North Dakota courts to hear Quill's § 1983 claim.

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[6] These statutes are listed and described at App. 140.

[7] These attorneys fee statutes are listed at App. 146.

A Preference for Uniformity Does Not Justify the North Dakota Supreme Court's Refusal to Entertain Quill's § 1983 Claim

The North Dakota Supreme Court makes a major point of the fact that its refusal to hear Quill's § 1983 claim is consistent with and advances a Congressional desire for uniform results in § 1983 cases. App. 10. According to the North Dakota Supreme Court, the goal of uniformity requires that a cause of action which may not be brought in federal court may not be brought in state court. This is a *reductio ad absurdum.*

In *Felder v. Casey,* the Court struck down a state "notice of claim" statute because it truncated the plaintiff's federal rights under § 1983. The Court found this restriction inconsistent with the Congressional intention to provide the broadest possible relief to those deprived of their federal rights by state action. The Court held that the state could not adopt procedural rules which restricted the plaintiff's federal rights beyond those rules applicable in federal court.

The North Dakota Supreme Court turns this "uniformity" principle on its head and uses it to deny Quill any forum within which to bring its § 1983 claim. What was a broad remedial and compensatory rule thus becomes a barrier to the vindication of federal rights. This is not what the Court or Congress intended.

In *Dennis v. Higgins,* 498 U.S. 439 (1991), the Court held that a taxpayer has a cause of action under § 1983 when its rights under the Commerce Clause are violated. These rights and that decision are a dead letter if the state courts can refuse to entertain § 1983 claims such as Quill's.

The North Dakota Supreme Court Has Offered No "Valid Excuse" for Refusing to Hear Quill's § 1983 Claim

The North Dakota Supreme Court cannot, and does not, claim that it has a "valid excuse" which justifies its refusal to hear Quill's § 1983 claim. Clearly, the District Court has jurisdiction over Quill's declaratory judgment action. Such jurisdiction is routinely exercised to hear claims based on state law. See, e.g. *Linderkamp v. Bismarck School District, No. 1*, 397 N.W.2d 76 (N.D. 1986). Thus, far from offering a "valid excuse", the opinion of the North Dakota Supreme Court exhibits a hostility toward Quill's federal claim which is not exhibited toward state claims. This type of discrimination was rejected in *Howlett*:

> An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou*, 223 U.S., at 57; see *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 703-704 (1942) ("By virtue of the Constitution, the courts of the several states must remain

> open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source"); *McKnett v. St. Louis & San Francisco R. Co.*, 292 U.S. 230, 233-234 (1934); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916); cf. *FERC v. Mississippi*, 456 U.S. 742, 776, n.1 (1982) (opinion of O'Connor, J.) (State may not discriminate against federal causes of action).

496 U.S., at 371-372. The Court should reject North Dakota's discrimination against Quill's federal claim just as it rejected Florida's discrimination against the federal claim in *Howlett*.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and reverse the decision of the North Dakota Supreme Court.

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v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
ROBERT E. HANSON,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, by and through its Tax Commissioner, Robert E. Hanson,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Civil No. 920283

(Filed May 11, 1993)

On Petition for Rehearing.

REQUEST FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988 DENIED.

Opinion of the Court by Meschke, Justice.

Donnita A. Wald (argued), and Christianne Y. Runge (appearance), Assistant Attorneys General, Tax Department, 600 East Boulevard Ave., Bismarck, ND 58505-0550, and M.K. Heidi Heitkamp (no appearance), Attorney General, Attorney General's Office, 600 East Boulevard Ave., Bismarck, ND 58505-0040, for plaintiff, appellant and cross-appellee.

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ND 58502-0400, for defendant, appellee and cross-appellant.

State v. Quill Corporation

Civil No. 920283

MESCHKE, Justice.

Quill Corporation has filed a petition for rehearing of our decision after remand from the United States Supreme Court. Quill asserts that it is a prevailing plaintiff in its 42 U.S.C. § 1983 action and is entitled to an award of attorney's fees under 42 U.S.C. § 1988. We hold that a § 1983 action seeking to enjoin the collection of state taxes is not cognizable in state court, and accordingly Quill is not entitled to recover its attorney's fees under § 1988.

The factual and procedural history of this litigation is outlined in our original opinion in this case. *See State v. Quill Corp.*, 470 N.W.2d 203 (N.D. 1991), *reversed by Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904 (1992). The State sought a declaratory judgment under NDCC Ch. 32-23 that Quill was required to collect and remit the applicable use tax on its sales of office equipment and supplies to customers in North Dakota. Quill answered that the use tax provisions, NDCC Ch. 57-40.2, violated Quill's rights under the Due Process Clause and Commerce Clause of the United States Constitution. Quill also counterclaimed for § 1983 relief for violation of its Due Process and Commerce Clause rights, and requested attorney's fees under § 1988.

The trial court held that NDCC 57-40.2-01(6) and (7) was unconstitutional as applied to Quill and that Quill could not be forced to collect and remit the use tax. The court dismissed Quill's counterclaim.

The State appealed to this court and Quill cross-appealed. We reversed, holding that imposition of the duty to collect and remit the use tax did not violate Quill's Due Process or Commerce Clause rights. *State v. Quill Corp.* The United States Supreme Court granted certiorari and reversed. *Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904 (1992). The Court agreed that Due Process did not bar imposition of the duty to collect the tax in this case, but held that the Commerce Clause prohibited imposition of the duty upon Quill.

Upon remand, we vacated the part of our opinion that had been reversed by the United States Supreme Court and affirmed the judgment of the trial court. *State v. Quill Corp.*, 487 N.W.2d 598 (N.D. 1992). Quill petitioned for rehearing, asserting that it was entitled to prevail on its § 1983 counterclaim and was entitled to attorney's fees under § 1988. We ordered supplementary briefing and granted a rehearing.

The State argued that this case is controlled by *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), in which we held that taxpayers could not bring a § 1983 action in state court to enjoin the assessment of state taxes if there was an adequate remedy available under state law. Quill argues that the rationale underlying *Linderkamp* has been rejected by the United States Supreme Court in *Howlett v. Rose*, 496 U.S. 356 (1990).

In *Linderkamp*, taxpayers sought to enjoin the levy of certain taxes by a school district. They sought relief under the Declaratory Judgment Act, asserted a § 1983 claim, and requested attorney's fees under § 1988. The district court granted summary judgment under the Declaratory Judgment Act and enjoined certain practices by the school district, but dismissed the § 1983 claim and refused to award attorney's fees.

On appeal, we considered the application of the Tax Injunction Act, 28 U.S.C. § 1341, that directs:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

We reasoned that § 1341 would have prohibited the taxpayers from litigating their § 1983 claim in federal court. Although we recognized that § 1341 directly applied only to federal district courts, we considered the policies underlying the Tax Injunction Act and the rationale employed by other state courts in similar cases. We concluded that § 1983 actions could not be brought in state court to enjoin the assessment, levy, or collection of state taxes:

> Thus, although we conclude that the Tax Injunction Act does not *per se* apply to state court actions, we nevertheless conclude that imposition of similar limitations under *state* law upon § 1983 actions brought in state court challenging the levy of state taxes is appropriate. We therefore hold that a taxpayer may not bring a § 1983 action in state court seeking to enjoin, suspend, or restrain the assessment, levy, or collection of

> any tax under state law where an adequate state remedy is available.

Linderkamp, 397 N.W.2d at 80 (footnote omitted). Because the taxpayers in *Linderkamp* had an adequate remedy under state law, we concluded that their § 1983 action was not cognizable in state court and, accordingly, that they were not entitled to attorney's fees under § 1988.

Quill concedes that the Declaratory Judgment Act provides a plain, speedy, and efficient remedy under state law, and that a § 1983 action in federal court would be barred by the Tax Injunction Act. Quill also apparently concedes that, if it is still good law, *Linderkamp* would bar its § 1983 action in state court. Quill's argument therefore rests entirely upon the premise that *Linderkamp* has been abrogated by *Howlett v. Rose*.

In *Howlett*, a former high school student began a § 1983 action in a Florida state court against a school board and three school officials, asserting that a search of his vehicle while it was parked on school premises violated his federal constitutional rights. The school board asserted that it was immune from suit under Florida's sovereign immunity law. The trial court dismissed the federal claims. The Florida District Court of Appeal held that Florida's statutory waiver of sovereign immunity did not apply to § 1983 cases, and affirmed dismissal of the federal claims. The Supreme Court of Florida denied review, and the United States Supreme Court granted certiorari.

The Supreme Court expressed the question presented in *Howlett* this way:

> The question in this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

Howlett, 496 U.S. at 358-359. The Court, after reviewing Florida statutes and case law, concluded that the school board could not rely upon the sovereign immunity defense, when such a defense would be unavailable if the action had been brought in federal court. The Court therefore reversed the judgment of the Florida District Court of Appeal.

Quill argues that *Howlett* stands for the proposition that a state court may not refuse to entertain a § 1983 action upon state law principles, even if the action could not have been brought in federal court. Quill misreads *Howlett*. In its brief, Quill argues:

> The parallels between the Florida court decision in *Howlett* and this Court's decision in *Linderkamp* are striking. In *Howlett*, plaintiff brought a state court action against a school board and several school officials which could not have been brought in federal court because of the Eleventh Amendment. Here, Quill counterclaimed for declaratory relief, a claim which could not be brought in federal court because of 28 U.S.C. § 1341.

However, the *Howlett* problem arose specifically because the school board and school officials were *not* protected by Eleventh Amendment immunity, and *would* have been subject to suit in federal court. That is not the case for Quill.

The Florida District Court of Appeal opinion in *Howlett* was premised upon the Florida Supreme Court's decision in *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988), in which the court applied the state sovereign immunity defense to preclude a § 1983 action in state court against a state agency. Addressing the Florida District Court of Appeal's reliance upon *Hill*, the Supreme Court stated:

> On its facts, the disposition of the *Hill* case would appear to be unexceptional. The defendant in *Hill* was a state agency protected from suit in a federal court by the Eleventh Amendment. See *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (§ 1983 does not "override the traditional sovereign immunity of the States"). As we held last Term in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), an entity with Eleventh Amendment immunity is not a "person" within the meaning of § 1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court.
>
> The language and reasoning of the State Supreme Court, if not its precise holding, however, went further. That further step was completed by the District Court of Appeal in this case. As that court construed the law, Florida has extended absolute immunity from suit not

> only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court. That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.

Howlett, 496 U.S. at 365-366 (footnotes omitted).[1] *Howlett* thus makes clear that a state is still not subject to suit under § 1983 in either federal court or state court.

Quill also urges that a passage from *Howlett* supports its assertion that *Linderkamp* is no longer good law:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, 496 U.S. at 367. We do not read this quotation as inconsistent with our holding in *Linderkamp*. Although the Court stresses that federal law is to be given force and effect in state courts, *see Kristensen v. Strinden*, 343 N.W.2d 67, 69-71 (N.D. 1983), we do not believe the Court intended to suggest that the remedy under § 1983 has lost its federal character. The Court has repeatedly stated that § 1983 is "a uniquely federal remedy." *See, e.g., Hardin v. Straub*, 490 U.S. 536, 539 n.5 (1989); *Felder v. Casey*, 487

U.S. 131, 139 (1988); *Wilson v. Garcia*, 471 U.S. 261, 271-272 (1985). The Court is merely saying that federal law is binding on the states, and that state courts do not have discretion to refuse to hear federal causes of action.

When the above quote from *Howlett* is read within the context of the entire opinion, it becomes apparent that the point the Court is making is that the Supremacy Clause precludes state courts from applying state procedural rules that would necessarily produce a different result than if the case had been brought in federal court. As the Court later explains:

> The elements of, and the defenses to, a federal cause of action are defined by federal law. . . . A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability- . . . . Since this Court has construed the word "person" in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant. Conversely, since the Court has held that municipal corporations and similar governmental entities are "persons," . . . a state court entertaining a § 1983 action must adhere to that interpretation.

Howlett, 496 U.S. at 375-376 (citations omitted). This makes clear that, still, neither a federal court nor a state court may entertain a § 1983 action against the state itself.

Rather, the Court's ruling in *Howlett* simply reiterates the preference for intrastate uniformity expressed in *Felder v. Casey* and *Wilson v. Garcia*. *Felder* is illustrative. In *Felder*, the Court held that a plaintiff was not required to

comply with Wisconsin's notice-of-claim statute as a prerequisite to bringing his § 1983 action in state court. The Court noted that application of the statute would often be outcome-determinative, creating a different result depending upon whether suit is brought in state or federal court. *Felder,* 487 U.S. at 151. The Court stressed that it was the intent of Congress that § 1983 would be applied uniformly within each state:

> Finally, in *Wilson,* we characterized § 1983 suits as claims for personal injuries because such an approach ensured that the same limitations period would govern all § 1983 actions brought in any given State, and thus comported with Congress' desire that the federal civil rights laws be given a uniform application within each State. . . . A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.

Felder, 487 U.S. at 152-153 (citation omitted). The federal interest in intrastate uniformity does not require recognition of a § 1983 claim in a state court when it would not be recognized in a federal court.

The result in *Linderkamp* is entirely consistent with the Congressional desire for uniform intrastate application. Unlike the Wisconsin notice-of-claim statute, which precluded certain plaintiffs from bringing in state court a § 1983 action that could have been brought in federal court, *Linderkamp* preserves uniformity of results in § 1983 actions, whether brought in state or federal court within North Dakota. Under the rationale of *Howlett,*

Felder, and *Wilson*, application of a state rule that fosters intrastate uniformity of results is consistent with Congressional intent and does not violate the Supremacy Clause.

We also remark that the result urged by Quill would reopen the "anomaly . . . that a State might be forced to entertain in its own courts suits from which it was immune in federal court," which the *Howlett* Court concluded had been "fully met" by *Will. Howlett*, 496 U.S. at 365. We find nothing in *Howlett* to indicate that the Court intended to require state courts to entertain § 1983 actions to enjoin assessment, levy, or collection of state taxes, when those actions could not be brought in federal court.

Several courts have held that *Howlett* does not require state courts to entertain § 1983 actions that would be barred in federal court by the Tax Injunction Act. In *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991), a mail-order company sought declaratory and injunctive relief under § 1983. The court concluded that "the United States Supreme Court did not hold in *Howlett v. Rose* that a state court must adjudicate a claim made under § 1983 that a federal court would not be required (or permitted) to entertain." *L.L. Bean*, 817 S.W.2d at 296. The court followed *Linderkamp* and other similar cases to conclude that its state courts were not required to entertain § 1983 actions that were barred in federal court by the Tax Injunction Act.[2]

In *Greenwich Township v. Murtagh*, 144 Pa.Commw. 624, 601 A.2d 1352, *appeal granted*, 530 Pa. 635, 606 A.2d 904 (1992), taxpayers brought a § 1983 action in state court challenging assessment of real property taxes. The

court joined the "consensus of other state courts" holding that a § 1983 action will not be entertained in state courts to challenge state tax administration if an adequate state remedy is available. *Greenwich Township*, 601 A.2d at 1356. The court noted that the Supreme Court's decision in *Howlett* was premised upon an attempt "to assure that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum." *Greenwich Township*, 601 A.2d at 1355. Similarly, in *Bufford v. Rodgers*, 912 F.2d 1338, 1341 n.1 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1312, 113 L.Ed.2d 246 (1991), the court noted that in *Howlett*, the Supreme Court had "clarified that, even in state court, local entities remain subject to suit from federal claims to the same extent as they would be in federal court."

We agree with the result and rationale of these cases. We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions challenging state tax administration when such actions would be barred in federal court. *Howlett*, *Felder*, and *Wilson* recognize that Congress intended that § 1983 be given a uniform application within each state. Accordingly, we read those cases as holding only that state rules that are outcome-determinative, in a manner inconsistent with federal law, will be violative of the Supremacy Clause. Application of the *Linderkamp* holding in this case to preclude a § 1983 action in state court that would be barred in federal court by the Tax Injunction Act is consistent with *Howlett*, *Felder*, and *Wilson*, and creates a uniform result in state and federal court.

One additional factor supports the conclusion we reach. Although the *Linderkamp* rule was created by a

state court, it was based exclusively upon federal law and policy. As we noted in *Linderkamp*, 397 N.W.2d at 79-80:

> In determining whether to impose similar restrictions on § 1983 actions brought in state court, we note the policy underpinnings of the Tax Injunction Act. Although federalism concerns are an important part of the Tax Injunction Act's legislative history, additional factors underl[ie] the statute's enactment, including a general recognition that state taxation embraces uniquely sensitive local concerns and that the greatest possible deference will be paid to state remedial schemes. As noted by Justice Brennan in his opinion concurring in part and dissenting in part in *Perez v. Ledesma*, 401 U.S. 82, 127, 91 S.Ct. 674, 698, 27 L.Ed.2d 701, 730, n. 17 (1971):
>
> > "The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law."

See also Geo. F. Alger Co. v. Peck, 74 S.Ct. 605, 607, 98 L.Ed. 1148, 1150 (1954) (Reed, J., in-chambers

opinion) ("The Congress by § 1341 left the burden on the taxpayers to follow the required state procedures rather than to determine the federal issues primarily in the federal courts").

Recognition that the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes leads to the conclusion that a state court § 1983 action, which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court. This concept has been recognized, albeit in a somewhat different context, by the United States Court of Appeals for the Seventh Circuit in *LaSalle National Bank v. Roswell*, 604 F.2d 530, 538-539 (7th Cir. 1979), *rev'd on other grounds*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981):

> "Defendants' position leads to the scenario of a state court adjudicating a cause of action and formulating a remedy – and throughout required to apply federal law. It would be difficult to say that this is less of an incursion into state autonomy than an action in federal court."

We also note the Supreme Court's observation in *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 116 (1981), that taxpayers may not challenge the validity of state tax systems through a § 1983 action in federal court, but "must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete." The Wisconsin Supreme Court succinctly analyzed *McNary* in *Hogan v. Musolf*, 163 Wis.2d 1, 471 N.W.2d 216, 222 (1991):

> The Supreme Court's primary interest in *McNary* was to avoid interference with state taxing practices by permitting states to have the opportunity to apply their remedies and procedures in tax matters before federal remedies are sought by a sec. 1983 action. We understand *McNary* as indicating that the Court is equally concerned that tax challenges be conducted according to state remedies as it is that they be conducted in a state forum. It would be no less disruptive of the state's internal economy and administrative tax procedures for a state court to act under sec. 1983 and suspend that usual tax collection and refund procedures of the state than it would be for a federal court to do so. In addition, regardless of which court interferes with the state's fiscal operations, tax officials would be improperly denied the opportunity to rectify any alleged impropriety before being subject to a sec. 1983 action. Accordingly, we conclude that the policies which motivated the Court's decision in *McNary* are equally applicable to sec. 1983 actions in state court.

We agree.

Finally, Quill suggested at oral argument that the Supreme Court's decision in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865 (1991), supports its assertion that a state court may be required to entertain a § 1983 action challenging state taxation. In *Dennis*, motor carriers challenged Nebraska's imposition of retaliatory taxes and fees on out-of-state carriers. They sued in state court seeking declaratory and injunctive relief, asserted a § 1983 claim, and sought attorney's fees under § 1988. The trial court found that the taxes and fees violated the Commerce Clause, granted injunctive relief, and awarded

attorney's fees under the "common fund" doctrine. The court dismissed the § 1983 claim. On appeal, the Supreme Court of Nebraska held that the Commerce Clause did not establish individual rights and could not provide the basis for a § 1983 claim. *Dennis v. State*, 451 N.W.2d 676 (Neb. 1990). The court also reversed the award of attorney's fees under the "common fund" doctrine. The United States Supreme Court reversed, resolving a division of authority on the issue, holding that the Commerce Clause confers "rights" within the meaning of § 1983. *Dennis*, 498 U.S. at ___, 111 S.Ct. at 870.

Quill asserts that *Dennis* "makes no sense" unless the Supreme Court viewed state courts as having authority to decide § 1983 tax challenges. However, the only issue addressed by the Supreme Court was "whether suits for violations of the Commerce Clause may be brought under . . . § 1983." *Dennis*, 498 U.S. at ___, 111 S.Ct. at 867. As noted in *Greenwich Township*, 601 A.2d at 1356-1357 n.11, "the majority in *Dennis* never discusses whether the state court had subject matter jurisdiction or whether there was a full and complete remedy at state law, apparently because those issues were not raised and because of the unique procedural history of that case."[3]

We read no "implied holding" into the Supreme Court's opinion in *Dennis*. Under *Howlett* and other contemporary Supreme Court cases, state courts clearly have concurrent jurisdiction over § 1983 claims. The Tax Injunction Act does not, on its face, restrict state court jurisdiction. A question arises about state court jurisdiction over a § 1983 tax challenge only when the state adopts a rule of law limiting jurisdiction to correspond to federal court jurisdiction. The Supreme Court of

Nebraska never reached that question, because it concluded that the Commerce Clause did not confer individual rights. Because the Supreme Court was not presented with any question about a state limitation upon jurisdiction of a § 1983 tax challenge, the Court's opinion in *Dennis* should not be read to "impliedly hold" that such limitations violate the Supremacy Clause.

We hold that Quill's § 1983 claim was properly dismissed in accordance with our holding in *Linderkamp*. Accordingly, Quill is not entitled to recover its attorney's fees under § 1988.

/s/ Herbert L. Meschke
/s/ Beryl J. Levine
/s/ Ralph J. Erickstad, S.J.
/s/ Gerald W. VandeWalle, C.J.

Surrogate Judge Ralph J. Erickstad was Chief Justice at the time this case was heard and served as surrogate judge for this case pursuant to NDCC 27-17-03.

Justice J. Philip Johnson, who was a member of the Court when this case was heard, did not participate in this decision.

Justice Neumann and Justice Sandstrom, not being members of the Court when this case was heard, did not participate in this decision.

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[1] In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989), the Supreme Court clarified that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against

the State.' " The parties have not raised this issue, and we express no opinion whether an action against "[t]he State of North Dakota, by and through its Tax Commissioner," is properly designated as an action for injunctive relief against a state official in her official capacity. Because we conclude that Quill's § 1983 action is not cognizable in state court under *Linderkamp*, we find it unnecessary to address this issue. *See Blatchford v. Native Village of Noatak*, ___ U.S. ___, ___, 111 S.Ct. 2578, 2584 (1991) (Tax Injunction Act bars official-capacity suits to enjoin state taxation in federal court).

[2] In *Bloomingdale's By Mail Ltd. v. Huddleston*, ___ S.W.2d ___ (Tenn. 1992), the Supreme Court of Tennessee recently reaffirmed its holding in *L.L. Bean*, stating that "*Howlett v. Rose* is not inconsistent with the Tennessee Supreme Court's decision in *L.L. Bean, Inc. v. Bracey*." *Bloomingdale's* ___ S.W.2d at ___. The court's per curiam opinion then distinguished *L.L. Bean* on the ground that, unlike the taxpayer in *L.L. Bean*, the taxpayer in *Bloomingdale's* had actually received an assessment. The court then inexplicably concluded that the taxpayer was entitled to § 1983 relief, including attorney's fees under § 1988, even though the taxpayer had never requested relief under §§ 1983 and 1988. To the extent that *Bloomingdale's* reaffirms *L.L. Bean* and indicates that a § 1983 action is improper when no assessment of taxes has yet been made, it supports our decision in this case.

[3] Although the majority did not mention the numerous unresolved questions about state court jurisdiction of § 1983 tax challenges, Justice Kennedy's dissent did:

> Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers. The Tax Injunction Act, 28 U.S.C. § 1341, prevents any attempt in federal court to "enjoin, suspend or restrain" assessment or collection of a state tax, so long as "a plain, speedy and efficient remedy may be had in the courts of such State." The principle of comity likewise prevents a federal court from entertaining any action for damages under § 1983 to redress allegedly unconstitutional state taxation. . . . Relying upon the "overriding interests of the state in an efficient,

> expeditious and nondisruptive resolution of . . . tax disputes," . . . state courts have refused to permit plaintiffs to proceed under § 1983 where there exists a complete remedy under state law. . . . These questions now become of paramount importance, as we risk destruction of state fiscal integrity in a manner which may require congressional correction.

Dennis, 498 U.S. at ___, 111 S.Ct. at 880 (Kennedy, J., dissenting) (citations omitted).

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AMENDED JUDGMENT

File No. 900257

Appeal from the District Court for Burleigh County.

Disposition upon remand from the United States Supreme Court

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Judgment rendered by this Court May 7, 1991, and reversed by the United States Supreme Court and remanded to this Court June 26, 1992; and the Court having considered the matter, it is ordered and adjudged that the OPINION RENDERED MAY 7, 1991, IS VACATED, THE OPINION FILED HEREWITH SUBSTITUTED THEREFOR, AND THE JUDGMENT OF THE DISTRICT COURT IS AFFIRMED.

It is further ordered and adjudged that costs be assessed pursuant to the mandate of the Supreme Court of the United States, a copy of which is attached hereto.

Dated: July 28, 1992.

By the Court:

/s/ Ralph J. Erickstad
Chief Justice
North Dakota
Supreme Court

Attest: By Marla Randal, Deputy
Clerk of the Supreme Court

Seal

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff, Appellant and Cross-Appellee

v.

Quill Corporation,

Defendant, Appellee and Cross-Appellant

Civil No. 900257

(Filed Jul. 28, 1992)

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Benny A. Graff, Judge. Disposition upon remand from the United States Supreme Court.

OPINION RENDERED MAY 7, 1991, VACATED; JUDGMENT OF DISTRICT COURT AFFIRMED.

PER CURIAM.

Nicholas J. Spaeth, Attorney General, Bismarck, for plaintiff, appellant and cross-appellee.

John E. Gaggini and Don S. Harnack, of McDermott, Will & Emery, Chicago, IL, and William P. Pearce, of Pearce & Durick, Bismarck, for defendant, appellee and cross-appellant.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP

v.

QUILL CORPORATION

Civil No. 900257

PER CURIAM.

In *State of North Dakota v. Quill Corporation*, 470 N.W.2d 203 (N.D. 1991), we held that subsections (6) and (7) of Section 57-40.2-01, NDCC, requiring Quill to collect and remit use tax on its sales in North Dakota, did not violate the Due Process Clause and Commerce Clause of the United States Constitution. In *Quill Corporation v. North Dakota*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.3rd ___ (1992), the United States Supreme Court, although agreeing with our conclusion that the Due Process Clause does not bar enforcement of the use tax against Quill, reversed our judgment and remanded for further proceedings consistent with its opinion, concluding that North Dakota's

enforcement of the use tax against Quill places an unconstitutional burden on interstate commerce in the absence of action by the United States Congress to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.

We vacate that portion of our opinion reported in *State of North Dakota v. Quill Corporation*, 470 N.W.2d 203 (N.D. 1991), which was reversed by the United States Supreme Court, substitute this opinion therefor, and affirm the judgment of the district court.

/s/ Gerald W. VandeWalle
/s/ Beryl J. Levine
/s/ Herbert L. Meschke
/s/ Ralph J. Erickstad, C.J.

Justice Johnson not being a member of this Court at the time this case was heard did not participate in this decision.

SUPREME COURT OF THE UNITED STATES

Syllabus

QUILL CORP. *v.* NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEITKAMP

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 91-194. Argued January 22, 1992 – Decided May 26, 1992

Respondent North Dakota filed an action in state court to require petitioner Quill Corporation – an out-of-state mail-order house with neither outlets nor sales representatives in the State – to collect and pay a use tax on goods purchased for use in the State. The trial court ruled in Quill's favor. It found the case indistinguishable from *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, which, in holding that a similar Illinois statute violated the Fourteenth Amendment's Due Process Clause and created an unconstitutional burden on interstate commerce, concluded that a "seller whose only connection with customers in the State is by common carrier or the . . . mail" lacked the requisite minimum contacts with the State. *Id.*, at 758. The State Supreme Court reversed, concluding, *inter alia*, that, pursuant to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, and its progeny, the Commerce Clause no longer mandated the sort of physical-presence nexus suggested in *Bellas Hess;* and that, with respect to the Due Process Clause, cases following *Bellas Hess* had not construed minimum contacts to require physical presence within a State as a prerequisite to the legitimate exercise of state power.

Held:

1. The Due Process Clause does not bar enforcement of the State's use tax against Quill. This Court's due process jurisprudence has evolved substantially since *Bellas Hess*, abandoning formalistic tests focused on a defendant's presence within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of the federal system of government, to require it to defend the suit in that State. See, *Shaffer v. Heitner*, 433 U.S. 186, 212. Thus, to the extent that this Court's decisions have indicated that the clause requires a physical presence in a State, they are overruled. In this case, Quill has purposefully directed its activities at North Dakota residents, the magnitude of those contacts are more than sufficient for due process purposes, and the tax is related to the benefits Quill receives from access to the State. Pp. 5-8.

2. The State's enforcement of the use tax against Quill places an unconstitutional burden on interstate commerce. Pp. 9-19.

(a) *Bellas Hess* was not rendered obsolete by this Court's subsequent decision in *Complete Auto, supra*, which set forth the four-part test that continues to govern the validity of state taxes under the Commerce Clause. Although *Complete Auto* renounced an analytical approach that looked to a statute's formal language rather than its practical effect in determining a state tax statute's validity, the *Bellas Hess* decision did not rely on such formalism. Nor is *Bellas Hess* inconsistent with *Complete Auto*. It concerns the first part of the *Complete Auto* test and stands for

the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause. Pp. 9-12.

(b) Contrary to the State's argument, a mail-order house may have the "minimum contacts" with a taxing State as required by the Due Process Clause, and yet lack the "substantial nexus" with the State required by the Commerce Clause. These requirements are not identical and are animated by different constitutional concerns and policies. Due process concerns the fundamental fairness of governmental activity, and the touchstone of due process nexus analysis is often identified as "notice" or "fair warning." In contrast, the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy. Pp. 12-13.

(c) The evolution of this Court's Commerce Clause jurisprudence does not indicate repudiation of the *Bellas Hess* rule. While cases subsequent to *Bellas Hess* and concerning other types of taxes have not adopted a bright-line, physical presence requirement similar to that in *Bellas Hess*, see, *e.g.*, *Standard Pressed Steel Co. v. Department of Revenue of Wash.*, 419 U.S. 560, their reasoning does not compel rejection of the *Bellas Hess* rule regarding sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the rule remains good law. Pp. 14-18.

(d) The underlying issue here is one that Congress may be better qualified to resolve

and one that it has the ultimate power to resolve. Pp. 18-19.

470 N.W.2d 203, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part.

SUPREME COURT OF THE UNITED STATES

No. 91-194

QUILL CORPORATION, PETITIONER *v.* NORTH DAKOTA BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

[May 26, 1992]

JUSTICE STEVENS delivered the opinion of the Court.

This case, like *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967), involves a State's attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State. In *Bellas Hess* we held that a similar

Illinois statute violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce. In particular, we ruled that a "seller whose only connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State. *Id.*, at 758.

In this case the Supreme Court of North Dakota declined to follow *Bellas Hess* because "the tremendous social, economic, commercial, and legal innovations" of the past quarter-century have rendered its holding "obsole[te]." 470 N. W. 2d 203, 208 (1991). Having granted certiorari, 502 U. S. ___, we must either reverse the State Supreme Court or overrule *Bellas Hess*. While we agree with much of the State Court's reasoning, we take the former course.

I

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. None of its employees work or reside in North Dakota and its ownership of tangible property in that State is either insignificant or nonexistent.[1] Quill sells office equipment

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[1] In the trial court, the State argued that because Quill gave its customers an unconditional 90-day guarantee, it retained title to the merchandise during the 90-day period after delivery. The trial court held, however, that title passed to the purchaser when the merchandise was received. See App. to Pet. for Cert. A40-A41. The State Supreme Court assumed for the purposes of its decision that that ruling was correct. 470 N. W. 2d 203, 217, n. 13. The State Supreme Court also noted that Quill licensed a

and supplies; it solicits business through catalogs and flyers, advertisements in national periodicals, and telephone calls. Its annual national sales exceed $200,000,000, of which almost $1,000,000 are made to about 3,000 customers in North Dakota. It is the sixth largest vendor of office supplies in the State. It delivers all of its merchandise to its North Dakota customers by mail or common carrier from out-of-state locations.

As a corollary to its sales tax, North Dakota imposes a use tax upon property purchased for storage, use or consumption within the State. North Dakota requires every "retailer maintaining a place of business in" the State to collect the tax from the consumer and remit it to the State. N. D. Cent. Code § 57-40.2-07 (Supp. 1991). In 1987 North Dakota amended the statutory definition of the term "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in th[e] state." § 57-40.2-01(6). State regulations in turn define "regular or systematic solicitation" to mean three or more advertisements within a 12-month period. N. D. Admin. Code § 81-04.1-01-03.1 (1988). Thus, since 1987, mail-order companies that engage in such solicitation have been subject to the tax even if they maintain no property or personnel in North Dakota.

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computer software program to some of its North Dakota customers that enabled them to check Quill's current inventories and prices and to place orders directly. *Id.*, at 216-217. As we shall explain, Quill's interests in the licensed software does not affect our analysis of the due process issue and does not comprise the "substantial nexus" required by the Commerce Clause. See *infra* n. 8.

Quill has taken the position that North Dakota does not have the power to compel it to collect a use tax from its North Dakota customers. Consequently, the State, through its Tax Commissioner, filed this action to require Quill to pay taxes (as well as interest and penalties) on all such sales made after July 1, 1987. The trial court ruled in Quill's favor, finding the case indistinguishable from *Bellas Hess*; specifically, it found that because the State had not shown that it had spent tax revenues for the benefit of the mail-order business, there was no "nexus to allow the state to define retailer in the manner it chose." App. to Pet. for Cert. A41.

The North Dakota Supreme Court reversed, concluding that "wholesale changes" in both the economy and the law made it inappropriate to follow *Bellas Hess* today. 470 N. W. 2d, at 213. The principal economic change noted by the court was the remarkable growth of the mail-order business "from a relatively inconsequential market niche" in 1967 to a "goliath" with annual sales that reached "the staggering figure of $183.3 billion in 1989." *Id.*, at 208, 209. Moreover, the court observed, advances in computer technology greatly eased the burden of compliance with a " 'welter of complicated obligations' " imposed by state and local taxing authorities. *Id.*, at 215 (quoting *Bellas Hess*, 386 U. S., at 759-760).

Equally important, in the court's view, were the changes in the "legal landscape." With respect to the Commerce Clause, the court emphasized that *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1977), rejected the line of cases holding that the direct taxation of interstate commerce was impermissible and adopted instead a "consistent and rational method of inquiry [that focused

on] the practical effect of [the] challenged tax." *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U. S. 425, 443 (1980). This and subsequent rulings, the court maintained, indicated that the Commerce Clause no longer mandated the sort of physical-presence nexus suggested in *Bellas Hess.*

Similarly, with respect to the Due Process Clause, the North Dakota court observed that cases following *Bellas Hess* had not construed "minimum contacts" to require physical presence within a State as a prerequisite to the legitimate exercise of state power. The State Court then concluded that "the Due Process requirement of a 'minimal connection' to establish nexus is encompassed within the *Complete Auto* test" and that the relevant inquiry under the latter test was whether "the state has provided some protection, opportunities, or benefit for which it can expect a return." 470 N. W. 2d, at 216.

Turning to the case at hand, the State Court emphasized that North Dakota had created "an economic climate that fosters demand for" Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year. *Id.*, at 218-219. Based on these facts, the court concluded that Quill's "economic presence" in North Dakota depended on services and benefits provided by the State and therefore generated "a constitutionally sufficient nexus to justify imposition of

the purely administrative duty of collecting and remitting the use tax." *Id.*, at 219.[2]

II

As in a number of other cases involving the application of state taxing statutes to out-of-state sellers, our holding in *Bellas Hess* relied on both the Due Process Clause and the Commerce Clause. Although the "two claims are closely related," *Bellas Hess*, 386 U. S., at 756, the clauses pose distinct limits on the taxing powers of the States. Accordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause. See, *e. g., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U. S. 232 (1987).

The two constitutional requirements differ fundamentally, in several ways. As discussed at greater length below, see *infra*, at Part IV, the Due Process Clause and the Commerce Clause reflect different constitutional concerns. Moreover, while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, see *International Shoe Co. v. Washington*, 326 U. S. 310, 315

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[2] The court also suggested that, in view of the fact that the "touchstone of Due Process is fundamental fairness" and that the "very object" of the Commerce Clause is protection of interstate business against discriminatory local practices, it would be ironic to exempt Quill from this burden and thereby allow it to enjoy a significant competitive advantage over local retailers. 470 N. W. 2d, at 214-215.

(1945), it does not similarly have the power to authorize violations of the Due Process Clause.

Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.

> " 'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. . . . To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue.' But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones." *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part).

Heeding Justice Rutledge's counsel, we consider each constitutional limit in turn.

III

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Bros.*

Co. v. Maryland, 347 U. S. 340, 344-345 (1954), and that the "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.' " *Moorman Mfg. Co. v. Bair*, 437 U. S. 267, 273 (1978) (citation omitted). Here, we are concerned primarily with the first of these requirements. Prior to *Bellas Hess*, we had held that that requirement was satisfied in a variety of circumstances involving use taxes. For example, the presence of sales personnel in the State,[3] or the maintenance of local retail stores in the State,[4] justified the exercise of that power because the seller's local activities were "plainly accorded the protection and services of the taxing State." *Bellas Hess*, 386 U. S., at 757. The furthest extension of that power was recognized in *Scripto, Inc. v. Carson*, 362 U. S. 207 (1960), in which the Court upheld a use tax despite the fact that all of the seller's in-state solicitation was performed by independent contractors. These cases all involved some sort of physical presence within the State, and in *Bellas Hess* the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary. We expressly declined to obliterate the "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." 386 U. S., at 758.

Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the

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[3] *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939).

[4] *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941).

area of judicial jurisdiction. Building on the seminal case of *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.*, at 316 (quoting Milliken v. Meyer, 311 U. S. 457, 463 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's "presence" within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State. In *Shaffer v. Heitner*, 433 U. S. 186, 212 (1977), the Court extended the flexible approach that *International Shoe* had prescribed for purposes of *in personan* jurisdiction to *in rem* jurisdiction, concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State. As we explained in *Burger King Corp. v. Rudzewicz*, 471 U. S. 462 (1985):

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact

> of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*, at 476 (emphasis in original).

Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U. S., at 218 (STEVENS, J., concurring in judgment). In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: the requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts are more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the

State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.

IV

Article I, § 8, cl. 3 of the Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." It says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, as Justice Johnson suggested in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 231-232, 239 (1824), the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The clause, in Justice Stone's phrasing, "by its own force" prohibits certain state actions that interfere with interstate commerce. *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U. S. 177, 185 (1938).

Our interpretation of the "negative" or "dormant" Commerce Clause has evolved substantially over the years, particularly as that clause concerns limitations on state taxation powers. See generally, P. Hartman, Federal Limitations on State and Local Taxation §§ 2:9-2:17 (1981). Our early cases, beginning with *Brown v. Maryland*, 12 Wheat. 419 (1827), swept broadly, and in *Leloup v. Port of Mobile*, 127 U. S. 640, 648 (1888), we declared that "no State has the right to lay a tax on interstate commerce in any form." We later narrowed that rule and distinguished between direct burdens on interstate commerce, which were prohibited, and indirect burdens, which generally were not. See, *e. g.*, *Sanford v. Poe*, 69 F. 546 (CA6 1895),

aff'd *sub nom. Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194, 220 (1897). *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 256-258 (1938), and subsequent decisions rejected this formal, categorical analysis and adopted a "multiple-taxation doctrine" that focused not on whether a tax was "direct" or "indirect" but rather on whether a tax subjected interstate commerce to a risk of multiple taxation. However, in *Freeman v. Hewit,* 329 U. S. 249, 256 (1946), we embraced again the formal distinction between direct and indirect taxation, invalidating Indiana's imposition of a gross receipts tax on a particular transaction because that application would "impos[e] a direct tax on interstate sales." Most recently, in *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 285 (1977), we renounced the *Freeman* approach as "attaching constitutional significance to a semantic difference." We expressly overruled one of *Freeman's* progency, *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951), which held that a tax on "the privilege of doing interstate business" was unconstitutional, while recognizing that a differently denominated tax with the same economic effect would not be unconstitutional. *Spector,* as we observed in *Railway Express Agency, Inc. v. Virginia,* 358 U. S. 434, 441 (1959), created a situation in which "magic words or labels" could "disable an otherwise constitutional levy." *Complete Auto* emphasized the importance of looking past "the formal language of the tax statute [to] its practical effect," *Complete Auto,* 430 U. S., at 279, and set forth a

four-past test that continues to govern the validity of state taxes under the Commerce Clause.[5]

Bellas Hess was decided in 1967, in the middle of this latest rally between formalism and pragmatism. Contrary to the suggestions of the North Dakota Supreme Court, this timing does not mean that *Complete Auto* rendered *Bellas Hess* "obsolete." *Complete Auto* rejected *Freeman* and *Spector's* formal distinction between "direct" and "indirect" taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on "legal terminology," "draftsmanship and phraseology." 430 U. S., at 281. *Bellas Hess* did not rely on any such labeling of taxes and therefore did not automatically fall with *Freeman* and its progeny.

While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Compete Auto* and our recent cases. Under *Complete Auto's* four-part test, we will sustain a tax against a Commerce Clause challenge so long as the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against

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[5] Under our current Commerce Clause jurisprudence, "with certain restrictions, interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co. v. McNamara*, 486 U. S. 24, 31 (1988); see also *Commonwealth Edison Co. v. Montana*, 453 U. S. 609, 623-624 (1981) ("[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (internal quotation and citation omitted).

interstate commerce, and [4] is fairly related to the services provided by the State." 430 U. S., at 279. *Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Thus, three weeks after *Complete Auto* was handed down, we cited *Bellas Hess* for this proposition and discussed the case at some length. In *National Geographic Society v. California Bd. of Equalization,* 430 U. S. 551, 559 (1977), we affirmed the continuing vitality of *Bellas Hess'* "sharp distinction . . . between mail-order sellers with [a physical presence in the taxing] State and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." We have continued to cite *Bellas Hess* with approval ever since. For example, in *Goldberg v. Sweet,* 488 U. S. 252, 263 (1989), we expressed "doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. See *National Bellas Hess* . . . (receipt of mail provides insufficient nexus)." See also *D. H. Holmes Co. v. McNamara,* 486 U. S. 24, 33 (1988); *Commonwealth Edison Co. v. Montana,* 453 U. S. 609, 626, (1981); *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U. S., at 437; *National Geographic Society,* 430 U. S., at 559. For these reasons, we disagree with the State Supreme Court's conclusion that our decision in *Complete Auto* undercut the *Bellas Hess* rule.

The State of North Dakota relies less on *Complete Auto* and more on the evolution of our due process jurisprudence. The State contends that the nexus requirements imposed by the Due Process and Commerce Clauses are

equivalent and that if, as we concluded above, a mail-order house that lacks a physical presence in the taxing State nonetheless satisfies the due process "minimum contacts" test, then that corporation also meets the Commerce Clause "substantial nexus" test. We disagree. Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, see, *e. g., Philadelphia v. New Jersey,* 437 U. S. 617 (1978), and bars state regulations that unduly burden interstate commerce, see, *e. g., Kassel v. Consolidated Freightways Corp. of Del.,* 450 U. S. 662 (1981).

The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and State-provided services, limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce.[6] Thus, the "substantial-nexus" requirement is not, like due process' "minimum-contacts" requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the State's suggestion, a corporation may have the "minimum contacts" with a taxing State as required by the Due Process Clause, and yet lack the

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[6] North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the *Bellas Hess* rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000-plus taxing jurisdictions. See *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753, 759-760 (1967) (noting that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle (a mail-order house) in a virtual welter of complicated obligations") (footnotes omitted); see also Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 925-926 (1992).

"substantial nexus" with that State as required by the Commerce Clause.[7]

The State Supreme Court reviewed our recent Commerce Clause decisions and concluded that those rulings signalled a "retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach" and thus supported its decision not to apply *Bellas Hess*. 470 N. W. 2d, at 214 (citing *Standard Pressed Steel Co. v. Department of Revenue of Wash.*, 419 U. S. 560 (1975), and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U. S. 232 (1987)). Although we agree with the State Court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer good law.

First, as the State Court itself noted, 470 N. W. 2d, at 214, all of these cases involved taxpayers who had a physical presence in the taxing State and therefore do not directly conflict with the rule of *Bellas Hess* or compel that it be overruled. Second, and more importantly, although our Commerce Clause jurisprudence now favors more

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[7] We have sometimes stated that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . Due Process requirement[s]." *Trinova Corp v. Michigan Dept. of Treasury*, 498 U. S. ___, ___ (1991) (slip op. 12). Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: a tax may be consistent with Due Process and yet unduly burden interstate commerce. See, *e. g.*, *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U. S. 232 (1987).

flexible balancing analyses, we have never intimated a desire to reject all established "bright-line" tests. Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule.

Complete Auto, it is true, renounced *Freeman* and its progeny as "formalistic." But not all formalism is alike. *Spector's* formal distinction between taxes on the "privilege of doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." *Complete Auto*, 430 U. S., at 279. In contrast, the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.[8]

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[8] In addition to its common-carrier contacts with the State, Quill also licensed software to some of its North Dakota clients. See *supra* n. 1. The State "concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus." Brief for Respondent 46. We agree. Although title to "a few floppy diskettes" present in a State might constitute some minimal nexus, in

Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. *Cf. National Geographic Society v. California Bd. of Equalization*, 430 U. S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U. S. 207 (1960). This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 457-458 (1959).

Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.[9] Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter-century is due

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National Geographic Society v. California Bd. of Equalization, 430 U. S. 551, 556 (1977), we expressly rejected a " 'slightest presence' standard of constitutional nexus." We therefore conclude that Quill's licensing of software in this case does not meet the "substantial nexus" requirement of the Commerce Clause.

[9] It is worth noting that Congress has, at least on one occasion, followed a similar approach in its regulation of state taxation. In response to this Court's indication in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 452 (1959), that,

in part to the bright-line exemption from state taxation created in *Bellas Hess*.

Notwithstanding the benefits of bright-line tests, we have, in some situations, decided to replace such tests with more contextual balancing inquiries. For example, in *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U. S. 375 (1983), we reconsidered a bright-line test set forth in *Public Utilities Comm'n of R. I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). *Attleboro* distinguished between state regulation of *wholesale* sales of electricity, which was constitutional as an "indirect" regulation of interstate commerce, and state regulation of *retail* sales of electricity, which was unconstitutional as a "direct regulation" of commerce. In *Arkansas Electric*, we considered whether to "follow the mechanical test set out in *Attleboro*, or the balance-of-interests test applied in our Commerce Clause cases." *Arkansas Electric Cooperative Corp.*, 461 U.S., at 390-391. We first observed that "the

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so long as the taxpayer has an adequate nexus with the taxing State, "net income from the interstate operations of a foreign corporation may be subjected to state taxation," Congress enacted Pub. L. 86-272, codified at 15 U. S. C. § 381. That statute provides that a State may not impose a net income tax on any person if that person's "only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State." 15 U. S. C. § 381. As we noted in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U. S. 275, 280 (1972), in enacting § 381, "Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. . . . Section 381 was designed to define clearly a lower limit for the exercise of [the State's power to tax]. *Clarity that would remove uncertainty was Congress' primary goal.*" (Emphasis supplied.)

principle of *stare decisis* counsels us, here as elsewhere, not lightly to set aside specific guidance of the sort we find in *Attleboro." Id.*, at 391. In deciding to reject the *Attleboro* analysis, we were influenced by the fact that the "mechanical test" was "anachronistic," that the Court had rarely relied on the test, and that we could "see no strong reliance interests" that would be upset by the rejection of that test. *Id.*, at 391-392. None of those factors obtains in this case. First, the *Attleboro* rule was "anachronistic" because it relied on formal distinctions between "direct" and "indirect" regulation (and on the regulatory counterparts of our *Freeman* line of cases); as discussed above, *Bellas Hess* turned on a different logic and thus remained sound after the Court repudiated and analogous distinction in *Complete Auto*. Second, unlike the *Attleboro* rule, we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, see *supra*, at 11, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound. Finally, again unlike the *Attleboro* rule, the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry. The "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis*, see *Runyon v. McCrary*, 427 U.S. 160, 190-191 (1976) (STEVENS, J., concurring), therefore counsels adherence to settled precedent.

In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the

area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law. For these reasons, we disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*.

This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve,[10] but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946). Indeed, in recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule.[11] Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we

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[10] Many States have enacted use taxes. See App. 3 to Brief for Direct Marketing Association as *Amicus Curiae*. An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses. The precise allocation of such burdens is better resolved by Congress rather than this Court.

[11] See, *e. g.*, H. R. 2230, 101st Cong., 1st Sess. (1989); S. 480, 101st Cong., 1st Sess. (1989); S. 2368, 100th Cong., 2d Sess. (1988); H. R. 3521, 100th Cong. 1st Sess. (1987); S. 1099, 100th Cong., 1st Sess. (1987); H. R. 3549, 99th Cong., 1st Sess. (1986); S. 983, 96th Cong., 1st Sess. (1979); S. 282, 93d Cong., 1st Sess. (1973).

have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.

Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, "this very fact [might] giv[e us] pause and counse[l] withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Commonwealth Edison Co. v. Montana*, 453 U. S. 609, 637 (1981) (WHITE, J., concurring). In this situation, it may be that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Id.*, at 638.

The judgment of the Supreme Court of North Dakota is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U. S. 753 (1967), held that the Due Process and Commerce Clauses of the Constitution prohibit a State from imposing the duty of use-tax collection and payment upon a seller whose only connection with the State is through common carrier or the United States mail. I

agree with the Court that the Due Process Clause holding of *Bellas Hess* should be overruled. Even before *Bellas Hess*, we had held, correctly I think, that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail. See *Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339 U. S. 643, 646-650 (1950) (Blue Sky laws). It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax. As an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State, but we have rejected that. *National Geographic Soc. v. California Bd. of Equalization*, 430 U. S. 551, 558 (1977); *Scripto, Inc. v. Carson*, 362 U. S. 207, 211 (1960). I agree with the Court, moreover, that abandonment of *Bellas Hess's* due process holding is compelled by reasoning "[c]omparable" to that contained in our post-1967 cases dealing with state jurisdiction to adjudicate. *Ante*, at 8. I do not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical; and on that basis I join Parts I, II, and III of the Court's opinion. Compare *Asahi Metal Industry Co. v. Superior Court*, 480 U. S. 102 (1987) with *American Oil Co. v. Neill*, 380 U. S. 451 (1965).

I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*. *American Trucking Assns., Inc. v. Smith*, 496 U. S. 167, 204 (1990) (SCALIA, J., concurring in judgment). Congress has the final say over regulation of interstate commerce, and it

can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989). See also *Hilton v. South Carolina Pub. Railways Comm'n*, 502 U. S. ___, ___ (1991) (slip op., at 4); *Illinois Brick Co. v. Illinois*, 431 U. S. 720, 736 (1977). Moreover, the demands of the doctrine are "at their acme . . . where reliance interests are involved," *Payne v. Tennessee*, 501 U. S. ___, ___ (1991) (slip op., at 18). As the Court notes, "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry," *ante*, at 17.

I do not share JUSTICE WHITE'S view that we may disregard these reliance interests because it has become unreasonable to rely upon *Bellas Hess*, *post*, at 11-12. Even assuming for the sake of argument (I do not consider the point) that later decisions in related areas are inconsistent with the principles upon which *Bellas Hess* rested, we have never acknowledged that, but have instead carefully distinguished the case on its facts. See, *e.g.*, *D. H. Holmes Co. v. McNamara*, 486 U. S. 24, 33 (1988); *National Geographic Soc.*, *supra*, at 559. It seems to me important that we retain our ability – and, what comes to the same thing, that we maintain public confidence in our ability – sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict. We seemed to be doing that in this area. Having affirmatively suggested that the "physical presence" rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word. We have recently

told lower courts that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). It is strangely incompatible with this to demand that private parties anticipate our overrulings. It is my view, in short, that reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day). Finally, the "physical presence" rule established in *Bellas Hess* is not "unworkable," *Patterson, supra,* at 173; to the contrary, whatever else may be the substantive pros and cons of the rule, the "bright-line" regime that it establishes, see *ante,* at 15-16, is unqualifiedly in its favor. JUSTICE WHITE's concern that reaffirmance of *Bellas Hess* will lead to a flurry of litigation over the meaning of "physical presence," see *post,* at 10, seems to me contradicted by 25 years of experience under the decision.

For these reasons, I concur in the judgment of the Court and join Parts I, II, and III of its opinion.

JUSTICE WHITE, concurring in part and dissenting in part.

Today the Court repudiates that aspect of our decision in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967), which restricts, under the Due Process Clause of the Fourteenth Amendment, the power

of the States to impose use tax collection responsibilities on out-of-state mail order businesses that do not have a "physical presence" in the State. The Court stops short, however, of giving *Bellas Hess* the complete burial it justly deserves. In my view, the Court should also overrule that part of *Bellas Hess* which justifies its holding under the Commerce Clause. I, therefore, respectfully dissent from Part IV.

I

In Part IV of its opinion, the majority goes to some lengths to justify the *Bellas Hess* physical presence requirement under our Commerce Clause jurisprudence. I am unpersuaded by its interpretation of our cases. In *Bellas Hess*, the majority placed great weight on the interstate quality of the mail order sales, stating that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Bellas Hess, supra*, at 759. As the majority correctly observes, the idea of prohibiting States from taxing "exclusively interstate" transactions had been an important part of our jurisprudence for many decades, ranging intermittently from such cases as *Case of State Freight Tax*, 15 Wall. 232, 279 (1873), through *Freeman v. Hewit*, 329 U. S. 249, 256 (1946), and *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951). But though it recognizes that *Bellas Hess* was decided amidst an upheaval in our Commerce Clause jurisprudence, in which we began to hold that "a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause," *Complete Auto Transit, Inc. v. Brady*, 430

U. S. 274, 285 (1977), the majority draws entirely the wrong conclusion from this period of ferment.

The Court attempts to paint *Bellas Hess* in a different hue from *Freeman* and *Spector* because the former "did not rely" on labeling taxes that had "direct" and "indirect" effects on interstate commerce. See *ante*, at 10-11. Thus, the Court concludes, *Bellas Hess* "did not automatically fall with *Freeman* and its progeny" in our decision in *Complete Auto*. See *id.*, at 11. I am unpersuaded by this attempt to distinguish *Bellas Hess* from *Freeman* and *Spector*, both of which were repudiated by this Court. See *Complete Auto, supra*, at 288-289, and n.15. What we disavowed in *Complete Auto* was not just the "formal distinction between 'direct' and 'indirect' taxes on interstate commerce," *ante*, at 10, but also the whole notion underlying the *Bellas Hess* physical presence rule – that "interstate commerce is immune from state taxation." *Complete Auto, supra*, at 288.

The Court compounds its misreading by attempting to show that *Bellas Hess* "is not inconsistent with *Complete Auto* and our recent cases." *Ante*, at 11. This will be news to commentators, who have rightly criticized *Bellas Hess*.[1]

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[1] See, *e. g.*, P. Hartman, Federal Limitations on State and Local Taxation § 10.8 (1981); Hartman, Collection of Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993, 1006-1015 (1986); Hellerstein, Significant Sales and Use Tax Developments During the Past Half Century, 39 Vand. L. Rev. 961, 984-985 (1986); *McCray, Overturning Bellas Hess:* Due Process Considerations, 1985 B.Y.U.L. Rev. 265, 288-290; Rothfeld, Mail Order Sales and State Jurisdiction to Tax, 53 Tax Notes 1405, 1414-1418 (1991).

Indeed, the majority displays no small amount of audacity in claiming that our decision in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 559 (1977), which was rendered several weeks after *Complete Auto*, reaffirmed the continuing vitality of *Bellas Hess*. See *ante*, at 11.

Our decision in that case did just the opposite. *National Geographic* held that the National Geographic Society was liable for use tax collection responsibilities in California. The Society conducted an out-of-state mail order business similar to the one at issue here and in *Bellas Hess*, and in addition, maintained two small offices in California that solicited advertisements for National Geographic Magazine. The Society argued that its physical presence in California was unrelated to its mail order sales, and thus that the *Bellas Hess* rule compelled us to hold that the tax collection responsibilities could not be imposed. We expressly rejected that view, holding that the "requisite nexus for requiring an out-of-state seller [the Society] to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between (the State and) the *person* . . . it seeks to tax.' " 430 U. S., at 561 (citation omitted).

By decoupling any notion of a *transactional* nexus from the inquiry, the *National Geographic* Court in fact repudiated the free trade rationale of the *Bellas Hess* majority. Instead, the *National Geographic* Court relied on a due process-type minimum contacts analysis that examined whether a link existed between the seller and the State wholly apart from the seller's in-state transaction

that was being taxed. Citations to *Bellas Hess* notwithstanding, see 430 U. S., at 559, it is clear that rather than adopting the rationale of *Bellas Hess*, the *National Geographic* Court was instead politely brushing it aside. Even were I to agree that the free trade rationale embodied in *Bellas Hess'* rule against taxes of purely interstate sales was required by our cases prior to 1967, therefore, I see no basis in the majority's opening premise that this substantive underpinning of *Bellas Hess* has not since been disavowed by our cases.[2]

II

The Court next launches into an uncharted and treacherous foray into differentiating between the

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[2] Similarly, I am unconvinced by the majority's reliance on subsequent decisions that have cited *Bellas Hess*. See *ante*, at 11. In *D.H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 33 (1988), for example, we distinguished *Bellas Hess* on the basis of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." We then went on to note that the situation presented was much more analogous to that in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551 (1977). See *id.*, at 33-34. In *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 626 (1981), the Court cited *Bellas Hess* not to revalidate the physical presence requirement, but rather to establish that a "nexus" must exist to justify imposition of a state tax. And finally, in *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 437 (1980), the Court cited *Bellas Hess* for the due process requirements necessary to sustain a tax. In my view, these citations hardly signal the continuing support of *Bellas Hess* that the majority seems to find persuasive.

"nexus" requirements under the Due Process and Commerce Clauses. As the Court explains, "[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies." *Ante*, at 12. The due process nexus, which the Court properly holds is met in this case, see *ante*, at Part III, "concerns the fundamental fairness of governmental activity." *Ante*, at 12. The Commerce Clause nexus requirement, on the other hand, is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Ibid.*

Citing *Complete Auto*, the Court then explains that the Commerce Clause nexus requirement is not "like due process' 'minimum-contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Ante*, at 13. This is very curious, because parts two and three of the *Complete Auto* test, which require fair apportionment and nondiscrimination in order that interstate commerce not be unduly burdened, now appear to become the animating features of the nexus requirement, which is the first prong of the *Complete Auto* inquiry. The Court freely acknowledges that there is no authority for this novel interpretation of our cases and that we have never before found, as we do in this case, sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause. See *ante*, at 13-14, and n.6.

The majority's attempt to disavow language in our opinions acknowledging the presence of due process

requirements in the *Complete Auto* test is also unpersuasive. See *ante*, at 13-14, n. 6 (citing *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U. S. ___, ___ (1991) (slip op., at ___)). Instead of explaining the doctrinal origins of the Commerce Clause nexus requirement, the majority breezily announces the rule and moves on to other matters. See *ante*, at 13-14. In my view, before resting on the assertion that the Constitution mandates inquiry into two readily distinct "nexus" requirements, it would seem prudent to discern the origins of the "nexus" requirement in order better to understand whether the Court's concern traditionally has been with the fairness of a State's tax or some other value.

The cases from which the *Complete Auto* Court derived the nexus requirement in its four-part test convince me that the issue of "nexus" is really a due process fairness inquiry. In explaining the sources of the four-part inquiry in *Complete Auto*, the Court relied heavily on Justice Rutledge's separate concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249 (1946), the case whose majority opinion the *Complete Auto* Court was in the process of comprehensively disavowing. Instead of the formalistic inquiry into whether the State was taxing interstate commerce, the *Complete Auto* Court adopted the more functionalist approach of Justice Rutledge in *Freeman*. See *Complete Auto*, 430 U. S., at 280-281. In conducting his inquiry, Justice Rutledge used language that by now should be familiar, arguing that a tax was unconstitutional if the activity lacked a sufficient connection to the State to give "jurisdiction to tax," *Freeman, supra*, at 271; or if the tax discriminated against interstate commerce; or if the activity was subjected to multiple tax burdens. 329

U.S., at 276-277. Justice Rutledge later refined these principles in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948), in which he described the principles that the *Complete Auto* Court would later substantially adopt: "[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory . . . ; [it] is duly apportioned . . . ; and cannot be repeated by any other state." 335 U.S., at 96-97 (concurring opinion)(footnotes omitted).

By the time the Court decided *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), Justice Rutledge was no longer on the Court, but his view of the nexus requirement as grounded in the Due Process Clause was decisively adopted. In rejecting challenges to a state tax based on the Due Process and Commerce Clauses, the Court stated that "[t]he taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' " *Id.*, at 464 (citation omitted). The Court went on to observe that "[i]t strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements." *Id.*, at 464-465 (quoting *Miller Bros.* v. *Maryland*, 347 U. S. 340, 344-345 (1954)). When the Court announced its four-part synthesis in *Complete Auto*, the nexus requirement was definitely traceable to concerns grounded in the Due Process Clause, and not the

Commerce Clause, as the Court's discussion of the doctrinal antecedents for its rule made clear. See *Complete Auto, supra*, at 281-282, 285. For the Court now to assert that our Commerce Clause jurisprudence supports a separate notion of nexus is without precedent or explanation.

Even were there to be such an independent requirement under the Commerce Clause, there is no relationship between the physical presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it. Perhaps long ago a seller's "physical presence" was a sufficient part of a trade to condition imposition of a tax on such presence. But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax. Wire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business. It is certainly true that the days of the door-to-door salesperson are not gone. Nevertheless, an out-of-state direct marketer derives numerous commercial benefits from the State in which it does business. These advantages include laws establishing sound local banking institutions to support credit transactions; courts to insure collection of the purchase price from the seller's customers; means of waste disposal from garbage generated by mail order solicitations; and creation and enforcement of consumer protection laws, which protect buyers and sellers alike, the former by ensuring that they will have a ready means of protecting against fraud, and the latter by creating a climate of

consumer confidence that inures to the benefit of reputable dealers in mail order transactions. To create, for the first time, a nexus requirement under the Commerce Clause independent of that established for due process purposes is one thing; to attempt to justify an anachronistic notion of physical presence in economic terms is quite another.

III

The illogic of retaining the physical presence requirement in these circumstances is palpable. Under the majority's analysis, and our decision in *National Geographic*, an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail order sales even if those sales were unrelated to the salesperson's solicitation efforts. By contrast, an out-of-state seller in a neighboring State could be the dominant business in the putative taxing State, creating the greatest infrastructure burdens and undercutting the State's home companies by its comparative price advantage in selling products free of use taxes, and yet not have to collect such taxes if it lacks a physical presence in the taxing State. The majority clings to the physical presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule. I am less impressed by the convenience of such adherence than the unfairness it produces. Here, convenience should give way. Cf. *Complete Auto, supra*, at 289, n.15 ("We believe,

however, that administrative convenience . . . is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way' ").

Also very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business – mail order sellers – but no countervailing advantage for its competitors. If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal. Indeed, arguably even under the majority's explanation for its "Commerce Clause nexus" requirement, the unfairness of its rule on retailers other than direct marketers should be taken into account. See *ante*, at 12 (stating that the Commerce Clause nexus requirement addresses the "structural concerns about the effects of state regulation on the national economy"). I would think that protectionist rules favoring a $180 billion-a-year industry might come within the scope of such "structural concerns." See Brief for State of New Jersey as *Amicus Curiae* at 4.

IV

The Court attempts to justify what it rightly acknowledges is an "artificial" rule in several ways. See *ante*, at 15. First, it asserts that the *Bellas Hess* principle "firmly establishes the boundaries of legitimate state taxing authority and reduces litigation concerning state taxation." *Ibid.* It is very doubtful, however, that the Court's opinion can achieve its aims. Certainly our cases now demonstrate two "bright-line" rules for mail order sellers

to follow: under the physical presence requirement reaffirmed here they will not be subjected to use tax collection if they have no physical presence in the taxing State; under the *National Geographic* rule, mail order sellers will be subject to use tax collection if they have some presence in the taxing State even if that activity has no relation to the transaction being taxed. See *National Geographic*, 430 U. S., at 560-562. Between these narrow lines lies the issue of what constitutes the requisite "physical presence" to justify imposition of use tax collection responsibilites.

Instead of confronting this question head-on, the majority offers only a cursory analysis of whether Quill's physical presence in North Dakota was sufficient to justify its use tax collection burdens, despite briefing on this point by the State.[3] See Brief for Respondent 45-47. North Dakota contends that even should the Court reaffirm the *Bellas Hess* rule, Quill's physical presence in North Dakota was sufficient to justify application of its use tax collection law. Quill concedes it owns software sent to its North Dakota customers, but suggests that such property is insufficient to justify a finding of nexus. In my view,

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[3] Instead of remanding for consideration of whether Quill's ownership of software constitutes sufficient physical presence under its new Commerce Clause nexus requirement, the majority concludes as a matter of law that it does not. See *ante*, n.8. In so doing, the majority rebuffs North Dakota's challenge without setting out any clear standard for what meets the Commerce Clause physical presence nexus standard and without affording the State an opportunity on remand to attempt to develop facts or otherwise to argue that Quill's presence is constitutionally sufficient.

the question of Quill's actual physical presence is sufficiently close to cast doubt on the majority's confidence that it is propounding a truly "bright-line" rule. Reasonable minds surely can, and will, differ over what showing is required to make out a "physical presence" adequate to justify imposing responsibilities for use tax collection. And given the estimated loss in revenue to States of more than $3.2 billion this year alone, see Brief for Respondents 9, it is a sure bet that the vagaries of "physical presence" will be tested to their fullest in our courts.

The majority next explains that its "bright-line" rule encourages "settled expectations" and business investment. *Ante*, at 15-16. Though legal certainty promotes business confidence, the mail order business has grown exponentially despite the long line of our post-*Bellas Hess* precedents that signalled the demise of the physical presence requirement. Moreover, the Court's seeming but inadequate justification of encouraging settled expectations in fact connotes a substantive economic decision to favor out-of-state direct marketers to the detriment of other retailers. By justifying the *Bellas Hess* rule in terms of "the mail order industry's dramatic growth over the last quarter-century," *ante*, at 16, the Court is effectively imposing its own economic preferences in deciding this case. The Court's invitation to Congress to legislate in this area signals that its preferences are not immutable, but its approach is different from past instances in which we have deferred to state legislatures when they enacted tax obligations on the State's share of interstate commerce. See, *e.g.*, *Goldberg* v. *Sweet*, 488 U. S. 252 (1989); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981).

Finally, the Court accords far greater weight to *stare decisis* than was given to that principle in *Complete Auto* itself. As that case demonstrates, we have not been averse to overruling our precedents under the Commerce Clause when they have become anachronistic in light of later decisions. See *Complete Auto*, 430 U. S., at 288-289. One typically invoked rationale for *stare decisis* – an unwillingness to upset settled expectations – is particularly weak in this case. It is unreasonable for companies such as Quill to invoke a "settled expectation" in conducting affairs without being taxed. Neither Quill nor any of its *amici* point to any investment decisions or reliance interests that suggest any unfairness in overturning *Bellas Hess*. And the costs of compliance with the rule, in light of today's modern computer and software technology, appear to be nominal. See Brief for Respondents 40; Brief for State of New Jersey as *Amicus Curiae* 18. To the extent Quill developed any reliance on the old rule, I would submit that its reliance was unreasonable because of its failure to comply with the law as enacted by the North Dakota state legislature. Instead of rewarding companies for ignoring the studied judgments of duly-elected officials, we should insist that the appropriate way to challenge a tax as unconstitutional is to pay it (or in this case collect it and remit it or place it in escrow) and then sue for declaratory judgment and refund.[4] Quill's refusal to comply with a state tax statute prior to its being held

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[4] For the federal rule, see *Flora* v. *United States*, 357 U. S. 63 (1958); see generally J. Mertens, Law of Federal Income Taxation § 58A.05 (1992). North Dakota appears to follow the same principle. See *First Bank of Buffalo* v. *Conrad*, 350 N. W. 2d 580, 586 (N.D. 1984) (citing 72 Am. Jur. 2d § 1087).

unconstitutional hardly merits a determination that its reliance interests were reasonable.

The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability. *Ante*, at 18, and n. 10. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. ___ (1991). As I thought in that case, such fears are groundless because no one can "sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system." *Id.*, at ___ (WHITE, J., concurring in judgment). Since we specifically limited the question on which certiorari was granted in order *not* to consider the potential retroactive effects of overruling *Bellas Hess*, I believe we should leave that issue for another day. If indeed fears about retroactivity are driving the Court's decision in this case, we would be better served, in my view, to address those concerns directly rather than permit them to infect our formulation of the applicable substantive rule.

Although Congress can and should address itself to this area of law, we should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified. The Commerce Clause aspect of *Bellas Hess*, along with its due process holding, should be overruled.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota by and through its Tax Commissioner, Heidi Heitkamp,

Plaintiff,

vs.

Quill Corporation,

Defendant.

JUDGMENT ON REMAND

Pursuant to the Judgment entered in this case on appeal to the Supreme Court, State of North Dakota, Supreme Court File No. 900257, dated May 7, 1991, and certified to this court on May 31, 1991, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with North Dakota Century Code ch. 57-40.2.

WITNESSETH, my hand and the seal of this Court, this 5th day of June, 1991.

[Signed]
Debra Huntley
Clerk of the District Court

STATE of North Dakota, By and Through its Tax Commissioner, Heidi HEITKAMP, Plaintiff, Appellant and Cross-Appellee.

v.

QUILL CORPORATION, Defendant, Appellee and Cross-Appellant.

Civ. No. 900257.

Supreme Court of North Dakota.

May 7, 1991.

Nicholas J. Spaeth, Atty. Gen., Bismarck, for plaintiff, appellant and cross-appellee. Appearance by Alan H. Friedman, Sp. Asst. Atty. Gen., Los Altos, Cal.

John E. Gaggini (argued), and Don S. Harnack (appearance), McDermott, Will & Emery, Chicago, Ill., and William P. Pearce (appearance), Pearce & Durick, Bismarck, for defendant, appellee and cross-appellant.

VANDE WALLE, Justice.

The State of North Dakota appealed from a district court summary judgment declaring that subsections (6) and (7) of Section 57-40.2-01, N.D.C.C., are unconstitutional as applied to Quill Corporation [Quill], and that the State therefore may not require Quill to collect and remit use tax on its sales to North Dakota consumers. Quill cross-appealed from that part of the summary judgment dismissing its action under 42 U.S.C. § 1983 and denying attorney's fees under 42 U.S.C. § 1988. We hold that Section 57-40.2-01, N.D.C.C., is constitutional as applied to Quill and accordingly we reverse the summary judgment.

I

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Quill sells office supplies, stationery, and equipment, offering over 9,500 different products ranging from paper clips to computers. Its annual sales are in excess of $200,000,000.

Quill solicits business through its numerous catalogs and flyers, advertisements in nationally distributed "card packs," advertisements in national periodicals and trade journals, and telephone solicitation of current customers. Of the more than 200,000 orders Quill receives monthly, approximately one-half are by telephone. The remaining half are received by mail, fax, telex, and by direct computer contact.

Quill's annual sales to nearly 3,500 active[1] North Dakota customers are just under $1,000,000. By sales volume, it is the sixth largest seller of office supplies in North Dakota. Quill each year mails over 60 different catalogs and flyers to its North Dakota customers. This amounts to more than 230,000 separate pieces of mail, weighing over 24 tons, sent into the State annually by Quill.

North Dakota imposes a use tax upon property purchased for storage, use, or consumption within the State. Section 57-40.2-01, N.D.C.C. The rate is equivalent to the corollary sales tax. See Sections 57-39.2-02.1 and 57-40.2-02.1, N.D.C.C. A credit is given if sales or use

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[1] Quill describes an "active" customer as one who has purchased from Quill within the past 24 months.

taxes have been paid to another state upon the same property. Section 57-40.2-11, N.D.C.C.

Although the consumer is ultimately responsible for the tax, a "retailer maintaining a place of business in this state" is required to collect the tax from the consumer and remit it to the State. Section 57-40.2-07, N.D.C.C. Section 57-40.2-01, N.D.C.C., defines "retailer" and "retailer maintaining a place of business in this state":

> "6. 'Retailer' includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter. . . . A retailer also includes every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.
>
> "7. 'Retailer maintaining a place of business in this state', or any like term, means any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state. . . . It also includes every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base,

> cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property."

Section 81-04.1-01-03.1(3) of the North Dakota Administrative Code defines "regular or systematic soliciation" as "three or more separate transmittances of any advertisement or advertisements" during a specified twelve-month period.[2]

Quill has refused to collect and remit use taxes on goods purchased and used by Quill's customers in North Dakota. The State, through its Tax Commissioner, commenced this declaratory judgment action under Chapter 32-23, N.D.C.C., seeking a declaration that Quill is a "retailer" and a "retailer maintaining a place of business in this state" which must collect and remit the applicable use tax on its sales to customers in this State.

Quill answered, alleging that chapter 57-40.2, N.D.C.C., as applied to Quill, is violative of the Due Process Clause and Commerce Clause of the United States Constitution as interpreted in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). Quill filed a counterclaim seeking relief under 42 U.S.C. § 1983 for alleged violations of its Due Process and Commerce Clause rights, and seeking attorney's fees under 42 U.S.C. § 1988.

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[2] Section 81-04.1-01-03.1, N.D.A.C., inexplicably states that the definitions therein apply to subsection 5 of Section 57-40.2-01, N.D.C.C. However, the definitions in the Administrative Code section have no logical relationship to subsection 5, and it is therefore apparent that this is an erroneous reference. The parties have not raised this as an issue.

On cross-motions for summary judgment, the district court held that the State could not constitutionally require Quill to collect and remit use taxes. Relying principally upon *Bellas Hess,* the district court held that the State had failed to establish a sufficient nexus between Quill and the State, and that subsections (6) and (7) of Section 57-40.2-01 were therefore unconstitutional as applied to Quill. The court dismissed Quill's counterclaim seeking relief under 42 U.S.C. §§ 1983 and 1988.

Judgment was entered accordingly and the State appealed. Quill cross-appealed from that part of the judgment dismissing its counterclaim.

II

A

Quill concedes that its solicitation of sales in North Dakota meets the statutory and administrative guidelines for a "retailer maintaining a place of business in this state." Thus, the dispositive issue on appeal is whether the State may constitutionally require Quill to collect and remit the use tax.

Any discussion of imposition of the duty of collecting a use tax upon an out-of-state seller must begin with an analysis of *Bellas Hess, supra.* National Bellas Hess was incorporated in Delaware and had its principal place of business in Missouri. Illinois attempted to require National Bellas Hess to collect and remit use tax on mail order sales into that state. The United States Supreme Court summarized the constitutional background:

"National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. . . . As to the former, the Court has held that 'State taxation falling on interstate commerce * * * can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' . . . The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Bellas Hess, supra,* 386 U.S. at 756, 87 S.Ct. at 1391, 18 L.Ed.2d at 508-509 (citations omitted).

Characterizing National Bellas Hess as a mail order seller which did "no more than communicate with customers in the State by mail or common carrier," [*Bellas Hess, supra,* 386 U.S. at 758, 87 S.Ct. at 1392, 18 L.Ed.2d at 510], the Court, in a 6-3 decision, held that this connection with Illinois was insufficient to require National Bellas Hess to collect and remit the use tax. The Court

drew a "bright line" distinction between mail order sellers whose only connection with its customers in the taxing state was by common carrier or the United States mail and those with more significant connections with the state.

The Court also stressed the substantial administrative burden upon National Bellas Hess if it were required to collect and remit use taxes to numerous jurisdictions. The Court noted that "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions." *Bellas Hess, supra,* 386 U.S. at 759-760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510 (footnotes omitted).

Justice Fortas, speaking for the dissenters in *Bellas Hess,* formulated a different approach for analyzing the contacts between a taxing state and an out-of-state seller necessary to satisfy Due Process and Commerce Clause requirements. Justice Fortas suggested a more case-specific approach which would take into consideration the nature and extent of the solicitation and exploitation of the state's consumer market:

> "There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is

> not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in 'exploitation of the consumer market' of Illinois . . . by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. Bellas Hess could not carry on its business in Illinois, and particularly its substantial credit business, without utilizing Illinois banking and credit facilities." *Bellas Hess, supra,* 386 U.S. at 761-762, 87 S.Ct. at 1394, 18 L.Ed.2d at 511-512 (Fortas, J., dissenting) (citations omitted).

Justice Fortas forecast the rationale for the diminishment of the constitutional significance of "physical presence" in such cases:

> "Bellas Hess enjoys the benefits of, and profits from the facilities nurtured by, the State of Illinois as fully as if it were a retail store or maintained salesmen therein. Indeed, if it did either, the benefit that it received from the State of Illinois would be no more than it now has – the ability to make sales of its merchandise, to utilize credit facilities, and to realize a profit; and, at the same time, it would be required to pay additional taxes. Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users – and remit to the State – the use tax which is merely equal to the sales tax which resident merchants must collect and remit. To excuse Bellas Hess from this obligation is to burden and penalize retailers located in Illinois

> who must collect the sales tax from their customers. In Illinois the rate is 3½%, and when it is realized that in some communities the sales tax requires, in effect, that as much as 5% be added to the amount that customers of local, tax-paying stores must pay, the importance of the competitive discrimination becomes apparent. While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional, minor and sporadic and not the result of a calculated, systematic exploitation of the market, it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis. In such cases, the difference between the nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance." *Bellas Hess, supra,* 386 U.S. at 762-763, 87 S.Ct. at 1394-1395, 18 L.Ed.2d at 512 (Fortas, J., dissenting).

The dissent also disputed the extent of the administrative burden which would be placed upon National Bellas Hess, noting that the majority's stated fear of entanglement of interstate commerce "vastly underestimates the skill of contemporary man and his machines." *Bellas Hess, supra,* 386 U.S. at 766, 87 S.Ct. at 1396, 18 L.Ed.2d at 514 (Fortas, J., dissenting). Justice Fortas therefore concluded that neither the Commerce Clause nor the Due Process Clause excused National Bellas Hess from complying with the Illinois use tax statutes.

B

The United States Supreme Court has not revisited this precise issue since 1967. While we necessarily begin our analysis in the context of the majority opinion in *Bellas Hess*, we are mindful that prior cases cannot be read in a vacuum, but must be considered in light of their relevant facts and historical context. See *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Scalia, J., concurring in part and dissenting in part). Similarly, appellate review in general is not to be conducted in a vacuum. *Cullen v. Williams County*, 446 N.W.2d 250 (N.D.1989). Appellate judges bring to each case their common sense, ordinary experience, and observation of human affairs. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (Rehnquist, C.J., dissenting); *State v. Olmstead*, 261 N.W.2d 880 (N.D.), *cert. denied*, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

Quill in effect asks us to accept the notion that the United States Supreme Court will abandon its common sense and experience at the courthouse door and ignore the tremendous social, economic, commercial, and legal innovations since 1967, and blindly apply an obsolescent precedent. We have in the past been chided by the United States Supreme Court for doing just that, and in failing to detect changes in legal course by that Court. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973), *reversing* 202 N.W.2d 140 (N.D.1972). See also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, 219 N.W.2d

140 (N.D. 1974) (on remand).[3] We are guided by the maxim that "[w]hen the reason of a rule ceases so should the rule itself." Section 31-11-05(1), N.D.C.C. We have little doubt that maxim has wider application than our state boundaries. As noted by Justice Cardozo, "[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, The Nature of the Judicial Process 151 (1921) [*quoted in Kitto v. Minot Park District*, 224 N.W.2d 795, 803 (N.D.1974)].

C

The economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists, save perhaps in the fertile imaginations of attorneys representing mail order interests. In the quarter-century which has passed in the interim, "mail order" has grown from a relatively inconsequential market niche into a

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[3] The United States Supreme Court stated that its opinion in an earlier case, upon which we had relied in holding unconstitutional a state statute, was "a derelict in the stream of the law." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra*, 414 U.S. at 167, 94 S.Ct. at 414, 38 L.Ed.2d at 387. Significantly, in overruling its prior case, the Court quoted with approval the dissent in the earlier case. See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra*; see also, *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy, supra*, 219 N.W.2d at 146.

Goliath now more accurately delineated as "direct marketing." The burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967.[4]

Rather than a few full-line mail order retailers essentially offering a "department store by mail," mail order is today marked by literally thousands of specialized catalogs targeted at specific groups of consumers. Technology has triggered this transformation, with computerized

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[4] Anyone with a telephone, television, or mailbox can attest to these modern marketing miracles. When you turn on your television set to one of the myriad of available cable channels, you are likely to see numerous commercials for products, "not available in any store," which must be ordered "before midnight tonight" by dialing the toll-free "800" number on the screen. If the commercials are not enough, you may find yourself watching a thirty-minute "infomercial" hawking items as diverse as cosmetics, car wax, weight loss plans, or cooking utensils. If you are a truly modern consumer, you may turn to one of the 24-hour home shopping channels, available on most cable systems, for a continuous opportunity to buy in the comfort of your living room.

The salesperson who calls on the telephone is likely to be armed with significant background information, including your age, occupation, ages of your children, and your hobbies and buying habits, so that sales calls can be specifically targeted to those customers statistically inclined to purchase certain products. Or, if you prefer, through the wonders of technology you can browse through a computer "catalog," check availability and price of the item you want, and place your order directly through the seller's computer across the country.

The revolution in direct marketing techniques and technology is recounted in Stone, *Direct Marketing: Then and Now, Direct Marketing,* May 1988, p. 38.

database marketing allowing mailings directed to specific demographical groups. In fact, the sale and rental of lists of names of prior or potential mail order purchasers has itself become a three-billion-dollar business.[5] Technology has also changed the method of receiving orders, with the increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering replacing the less-immediate "mail" order, and advances in the parcel delivery industry allow a wide variety of options, including overnight delivery.

Perhaps the greatest change in mail order since 1967 has been in terms of sheer volume. Gone are the days of the Spring and Fall Sears catalog being the definition of mail order. It is estimated that in 1990 13.6 *billion* catalogs were mailed to consumers in the United States, an increase of 7.8 billion in ten years. Over 54 percent of Americans – 98 million – made a mail order purchase, an increase of 40 million since 1983.[6] Mail order sales, in the neighborhood of $2.4 billion in 1967 [*see Bellas Hess, supra,* (Fortas, J., dissenting)], reached the staggering figure of $183.3 billion in 1989.[7] By the mid-1980's, mail order accounted for more than 15 percent of total sales nationally. See, e.g., 43 Cong.Q. 2571 (Dec. 7, 1985); Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales,* 39 Vand.L.Rev. 993 (1986).

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[5] *Time,* November 26, 1990, at p. 66.

[6] These figures are from the Direct Marketing Association, as reported in their special advertising section in the March 14, 1991, edition of USA Today, at pp. 10A-11A.

[7] See *Time,* November 26, 1990, at p. 63; *Direct Marketing,* July 1990, at p. 30.

While in 1967 it may have generally been necessary to rely upon in-state sales personnel and inventory to successfully market a product, technology has changed the rules of the game. Today a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer. Clearly the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's.

D

Just as the changes in marketing techniques have affected the economic and commercial landscape since *Bellas Hess*, so too has the legal landscape been altered in that quarter-century.[8] The Supreme Court's expansion of state authority to tax interstate commerce, as well as its broadening of other areas of Due Process and Commerce Clause analysis, leads us to conclude that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude.

Perhaps the most striking shift in the Court's position on taxation of interstate commerce occurred in *Complete*

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[8] As the Supreme Court noted in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510, 524 (1980), "[t]he effect of the Commerce Clause on state taxation of interstate commerce . . . appears to be undergoing a revival of sorts" and "this Court has addressed the issue and has attempted to clarify the apparently conflicting precedents it has spawned."

Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), in which the Court overruled years of precedent and developed a four-prong test to assess Commerce clause challenges to state taxation of interstate commerce. Prior to that time, Commerce Clause analysis was controlled by the free trade view, as enunciated in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), that direct taxation of interstate commerce was *per se* unconstitutional. See P. Hartman, Federal Limitations on State and Local Taxation §§ 2:16, 2:17 (1981) [hereafter "Hartman, Federal Limitations"]; Recent Developments, *D.H. Holmes Co. v. McNamara: Use Tax on Catalogs Does Not Violate Commerce Clause*, 63 Tul.L.Rev. 407 (1988). Thus, at the time of *Bellas Hess*, Commerce Clause analysis often focused upon whether the challenged tax was levied upon the privilege of doing interstate business or upon some other less-direct incidence of interstate commerce.

The *Spector* doctrine was widely criticized as dependent upon illusory distinctions, legislative labeling, and insubstantial and pointless formalism. Hartman, Federal Limitations, *supra*, at §§ 2:16-2:17; see also, *Complete Auto, supra;* McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb.Law. 529 (1985); Recent Developments, 63 Tul.L.Rev. 407, *supra*. The Court, noting that the *Spector* rule "has no relationship to economic realities" and "stands only as a trap for the unwary draftsman," *Complete Auto, supra*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331, specifically overruled *Spector* and announced a four-prong test for evaluating Commerce Clause challenges to state taxation. Under the *Complete Auto* formulation, a tax does not

violate the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto, supra;* see also, *Trinova Corp. v. Michigan Department of Treasury,* ___ U.S. ___, 111 S.Ct. 818, 112 L.Ed.2d 884 (1991); *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988).

One month after deciding *Complete Auto,* the Court expanded the authority of the states to require out-of-state sellers to collect and remit a use tax in *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). National Geographic sold maps, atlases, globes, and books by mail order to California residents. National Geographic had two offices in California which solicited advertising for its magazine, but which performed no activities related to the mail order sales. National Geographic challenged California's authority to require collection of use tax on its mail order sales, alleging that there was insufficient nexus between its mail order sales and California.

In prior cases, including *Complete Auto,* the Court had phrased the nexus requirement in terms of the relationship between the taxing state and the *activity* to be taxed. In *National Geographic,* however, the Court expanded to concept of nexus in use tax cases to situations where the out-of-state *seller* has the requisite nexus with the taxing state. Thus, the Court focused upon the benefits and services provided by the state to National Geographic's

two advertising offices to support collection of use tax upon its unrelated mail order sales into the state.

In so holding, the Court stressed the distinction between the lesser burdens placed upon the seller by a use tax, which is ultimately borne by the in-state purchaser, and a more direct tax upon the seller:

> "Other fairly apportioned, nondiscriminatory direct taxes have also been sustained when the taxes have been shown to be fairly related to the services provided the out-of-state seller by the taxing State. . . .
>
> "The case for the validity of the imposition upon the out-of-state seller enjoying such services of a duty to collect a use tax is even stronger. . . . The out-of-state seller runs no risk of double taxation. The consumer's identification as a resident of the taxing State is self-evident. . . . The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the sole burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it." *National Geographic, supra,* 430 U.S. at 558, 97 S.Ct. at 1391, 51 L.Ed.2d at 638 (citations omitted).

Thus, the Court not only expanded the concept of nexus, but it also recognized the purely administrative nature of the collection duty in use tax cases and indicated that a lesser showing of nexus may suffice in such cases.

More recently, in a case presenting an interesting twist to the usual use tax situation, the Court upheld imposition of use taxes upon catalogs themselves in *D.H.*

Holmes Co. v. McNamara, supra. Holmes, which had thirteen stores in Louisiana, had its catalogs printed out-of-state and mailed from those locations directly to Louisiana customers. The catalogs promoted items available for sale in the local stores, and also could be used to order items by mail. Louisiana sought to collect from Holmes use taxes based upon the value of the catalogs, asserting that they were "used" by Holmes within the state.

The Court applied the *Complete Auto* test and upheld imposition of the tax. Most importantly for our purposes, the Court distinguished *Bellas Hess* in holding that Holmes had sufficient nexus with Louisiana. Although, as the Court noted, there was " 'nexus' aplenty" present, *Holmes, supra,* 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29, what is particularly noteworthy is the language employed by the Court to distinguish *Bellas Hess.* Notwithstanding that Holmes was incorporated in Louisiana, had its registered office there, and had thirteen stores with 5,000 employees in the state, the first factor noted by the Court in distinguishing *Bellas Hess* was "Holmes' significant *economic* presence in Louisiana." *Holmes, supra,* 486 U.S. at 33, 108 S.Ct. at 1624, 100 L.Ed.2d at 29 (emphasis added). In a case involving obvious physical presence, we find it significant that the Court chose to stress economic presence, the phraseology of the *Bellas Hess* dissent.

The Court has also discussed the broadening concept of nexus in cases involving constitutional challenges to other taxes upon interstate commerce. For example, in *Standard Pressed Steel Co. v. Washington Department of Revenue,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975), a

manufacturer of industrial and aerospace fasteners challenged imposition of Washington's business and occupation tax levied upon its unapportioned gross receipts from sales in the state. Standard Pressed Steel's sole connection with the state, other than its interstate sales, was one employee, working from his home in the state, who serviced the company's one large account in the state, the Boeing Company. This employee was a consultant only; he did not take orders on behalf of Standard.

Rather than focusing upon Standard's minimal physical contact with the state through a single employee, and the concomitant minimal benefits and services provided to the company, the Court instead emphasized the connection between the employee's activities and the establishment and continuance of sales to Boeing. In other words, instead of relying upon a bright-line demarcation based upon Standard's physical presence in the taxing state and the receipt of benefits and services, the Court in finding nexus stressed that the employee "made possible the realization and continuance of valuable contractual relations between [Standard] and Boeing" [*Standard Pressed Steel, supra,* 419 U.S. at 562, 95 S.Ct. at 708, 42 L.Ed.2d at 722], and that the employee's "services were substantial 'with relation to the establishment and maintenance of sales, upon which the tax was measured.' " *Standard Pressed Steel, supra,* 419 U.S. at 563, 95 S.Ct. at 709, 42 L.Ed.2d at 723 (*quoting General Motors Corp. v. Washington,* 377 U.S. 436, 447, 84 S.Ct. 1564, 1571, 12 L.Ed.2d 430, 439 (1964), *overruled on other grounds, Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987)). In so holding, the Court stated that Standard's asserted lack

of nexus "verges on the frivolous." *Standard Pressed Steel, supra,* 419 U.S. at 562, 95 S.Ct. at 708, 42 L.Ed.2d at 722.

In *Tyler Pipe, supra,* the Court was again presented with a nexus challenge to the Washington business and occupation tax. Tyler Pipe had one representative soliciting business in state, but, in contrast to *Standard Pressed Steel, supra,* Tyler Pipe's salesman was an independent contractor, not an employee. The Court, relying upon *Scripto, Inc. v. Carson,* 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), held that the salesman's status as an independent contractor was without constitutional significance. Concluding that the activities of the independent contractor within the state created a sufficient nexus to support imposition of the tax, the Court agreed with the Washington Supreme Court that " 'the crucial factor governing nexus is whether the activities performed in this state of behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.' " *Tyler Pipe, supra,* 483 U.S. at 250, 107 S.Ct. at 2821, 97 L.Ed.2d at 215-216 (*quoting Tyler Pipe Industries, Inc. v. State,* 105 Wash.2d 318, 323, 715 P.2d 123, 126 (1986)). Thus, in both *Standard Pressed Steel* and *Tyler Pipe,* the Court did not employ a bright-line physical presence test, but instead focused upon the relationship between the out-of-state seller's contacts with the state and its establishment and maintenance of sales within the state.

While the Court has been expanding states' authority to tax interstate commerce, it has also significantly broadened the closely related Due Process analysis in personal jurisdiction cases. In *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-473, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528,

540-541 (1985), the Court summarized some examples of conduct which will satisfy the minimum contacts requirement and justify assertion of personal jurisdiction over an out-of-state seller:

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities. . . . Thus '[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers. . . . Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. . . . And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities. . . . " (Citations omitted.)

It is clear that Quill "purposefully directed" its activities at North Dakota residents, has "reach[ed] out . . . and create[d] continuing relationships and obligations with citizens" of this State, and has gone beyond placing its products into a general stream of commerce – it has sold

and delivered its products directly to North Dakota consumers. It is therefore clear that Quill could, consistent with Due Process, be brought into a North Dakota court to litigate claims arising from those activities.

More significant, however, is the Court's clear recognition that technological advances have made physical presence within the jurisdiction meaningless in modern commerce:

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contract can defeat personal jurisdiction there." *Burger King, supra,* 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543.

The Court also recognized the unfairness which would result if out-of-state sellers were allowed to wholly escape responsibility for the consequences of their actions in other states:

> "Moreover, where individuals 'purposefully derive benefit' from their interstate activities . . . it may well be unfair to allow them to

> escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. . . . " *Burger King, supra,* 471 U.S. at 473-474, 105 S.Ct. at 2183, 85 L.Ed.2d at 541 (citations omitted).

E

In light of these wholesale changes in the social, economic, commercial, and legal arenas, we are required to apply *Bellas Hess* in a contemporary context as we believe the Supreme Court would apply that decision.

The Supreme Court has recently recognized that sweeping technological changes may require corresponding changes in legal doctrine. In *Goldberg v. Sweet,* 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), Illinois' telecommunications excise tax was challenged on Commerce Clause grounds. After a lengthy discussion of the "explosion in new telecommunications technologies" [*Goldberg, supra,* 488 U.S. at 255, 109 S.Ct. at 585, 102 L.Ed.2d at 613], the Court concluded that "Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry." *Goldberg, supra,* 488 U.S. at 265, 109 S.Ct. at 591, 102

L.Ed.2d at 619. Commenting on prior cases striking down similar state taxes on interstate telecommunications, the court simply noted that "[t]hese cases considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete Auto* era when this Court held the view that interstate commerce itself could not be taxed." *Goldberg, supra,* 488 U.S. at 265 n. 16, 109 S.Ct. at 591 n. 16, 102 L.Ed.2d at 619 n. 16.

Similarly, the Court in *Burger King, supra,* 471 U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543, noted the technological changes which have affected modern commerce: "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." In *Goldberg* and *Burger King* the Court has recognized that legal theory must be flexible to account for societal changes, and that the vast technological explosion of recent years often requires rethinking of previous doctrine. We therefore are instructed to be cognizant of the vast differences between the mail order of the 1960's and the direct marketing of the 1990's when applying *Bellas Hess* in this case. In addition, the *Bellas Hess* majority specifically characterized the transactions there as being carried out only by mail or common carrier. Very little of the direct marketing of today is limited to mail or common carrier, and the facts of this case clearly demonstrate that Quill's business extended far beyond those limited circumstances.

We also recognize the Court's extensive shift in focus in interstate commerce tax cases. The Court has wholly

rewritten the underlying theory in such cases and formulated a new test to measure Commerce Clause challenges. See *Complete Auto, supra.* In *National Geographic, supra,* the Court stressed the administrative nature of the use tax collection requirement and held that a lower threshold of nexus may suffice in use tax cases than in attempts to collect a tax directly from the out-of-state seller. In *Holmes, supra,* the Court applied the *Complete Auto* test to judge a use tax and noted the seller's significant economic presence within the taxing state to find sufficient nexus and distinguish *Bellas Hess.*

Complete Auto and subsequent interstate commerce tax cases have been viewed as an abandonment of the Court's previous formalistic approach in favor of a "more realistic functional calculus" [L. Tribe, American Constitutional Law § 6-15, at 441 (2d ed. 1988)], "grounded in practicality and economic reality" [Recent Developments, 63 Tul.L.Rev. 407, *supra*]. See also, *Trinova Corp. v. Michigan Department of Treasury, supra; Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980). The Court's opinions in *Standard Pressed Steel* and *Tyler Pipe* also demonstrate a greater emphasis upon the economic consequences and realities of the transactions at issue rather than a bright-line physical presence test. Although in each of these cases there was some degree of physical presence within the taxing state, the Court's analysis evinces a retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach. Accordingly, we believe that a contemporary view of nexus is not dependent upon rigid benchmarks to be applied across the board, but requires a review of the totality of

the circumstances, on a case-by-case basis, with special emphasis upon the economic realities presented. See Hartman, *Collection of the Use Tax, supra.* This approach best comports with the Court's current Due Process and Commerce Clause analysis.

We are particularly mindful of the illogical results which can flow from a strict requirement of physical presence within the taxing state in light of the contemporary legal and commercial landscape. For example, a small out-of-state seller with minimal sales in the taxing state solicited through an independent-contractor traveling salesperson would have sufficient nexus to support a duty to collect and remit the use tax [see *Tyler Pipe, supra,* and *Scripto, supra*], yet a mail order leviathan with millions of dollars of annual sales solicited by innumerable catalogs and flyers, and consummated by telephone, fax, telex, or direct computer contract, would be deemed unreachable because it has insufficient nexus with the state. Such a result merely propounds the legal fiction that the fire and police protection provided to one salesperson hawking wares in the state provides a more significant "benefit" than does creating and maintaining a social and commercial climate that enables the out-of-state seller to exploit the state's consumer market to the tune of millions of dollars. See, e.g., Hartman, *Collection of the Use Tax, supra;* Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes,* 73 Nw.U.L.Rev. 112 (1978).

The Court's current personal jurisdiction analysis also strongly suggests a retrenchment from physical presence as a benchmark in Due Process analysis. A corporation that merely delivers its product into the stream of

commerce with the expectation that it will be purchased by a consumer in another state may be subjected to litigation there [*Burger King, supra*], yet Quill asserts that subjecting it to collection of the use tax, in spite of its continuous, intentional, and massive exploitation of this State's consumer market, would be violative of Due Process. It would be illogical indeed to hold that Quill, which could clearly be haled into a North Dakota court if one of its products injured a North Dakota consumer, could not be saddled with the purely *administrative* burden of collecting a use tax. See *National Geographic, supra.*

Finally, we note the irony in Quill's reliance upon the Due Process Clause and the Commerce Clause in seeking to maintain a tax-free mail order haven and thereby retain an economic advantage over its local competitors.[9] The touchstone of Due Process is fundamental fairness. *Burger King, supra; Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The "very object" of the Commerce Clause is protection of interstate commerce from discriminatory local practices. *Welton v. Missouri,* 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347, 349 (1875); see also, L. Tribe, American Constitutional Law, *supra,* at § 6-17. However, rather than employing the Commerce Clause as a shield against unfair, discriminatory practices favoring local merchants, Quill now raises the Commerce Clause as a sword to carve out a tax-free mail order niche and

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[9] Empirical studies have demonstrated the effect of the presence or absence of sales or use taxes upon consumer purchasing behavior. See, e.g., Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications,* 66 Journal of Retailing 222 (1990).

gain an unfair competitive advantage over local retailers. It would be odd indeed if we were to hold that out-of-state sellers may invoke the Due Process Clause to promote a fundamentally unfair economic advantage over local sellers.

We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota. Applying *Bellas Hess* in light of subsequent case law, and within the context of contemporary society and commercial practice, we conclude that the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks.

F

The Court in *Bellas Hess* also focused upon the "virtual welter of complicated obligations" which would be imposed upon mail order sellers if they were required to collect and remit use taxes in every state. *Bellas Hess, supra,* 386 U.S. at 760, 87 S.Ct. at 1393, 18 L.Ed.2d at 510. This basis for the Court's holding has also been seriously eroded by the technological advances of the past quarter-century. The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty. See,

e.g., Hartman, Federal Limitations, *supra*, at § 10:8; Hartman, *Collection of the Use Tax, supra;* McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L.Rev. 265 (1985).

In addition, in subsequent use tax cases the Supreme Court has all but ignored the burdensome nature of imposition of the collection duty. Furthermore, the Supreme Court has never struck down a use tax solely because of the administrative burdens placed upon the out-of-state seller if sufficient nexus had first been found.

Finally, we note that the seller is allowed to retain a percentage of the use taxes collected as reimbursement for expenses incurred in collecting and remitting the tax. Section 57-40.2-07.1, N.D.C.C. This further alleviates any burdens created by requiring Quill to collect and remit the tax.

We conclude that the burdensome nature of the use tax collection duty does not prohibit imposition of this duty upon Quill in this case.[10]

III

We now turn to the specifics of Quill's constitutional challenge in this case.

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[10] This argument is also undermined in this case by Quill's extensive computer expertise. Quill sells computers and related hardware, and has developed its own computer software to allow customers to contact Quill directly on their own computers to place orders, check price and availability, and communicate via an electronic bulletin board.

All legislative enactments are imbued with a strong presumption of constitutionality, and this presumption is conclusive unless it is clearly shown that the statute contravenes the state or federal constitution. *North Dakota Council of School Administrators v. Sinner,* 458 N.W.2d 280 (N.D.1990). The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity. *Best Products Co., Inc. v. Spaeth,* 461 N.W.2d 91 (N.D.1990); *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D.1978), *appeal dismissed,* 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979). Any doubt must be resolved in favor of the constitutionality of the statute. *North Dakota Council of School Administrators, supra.*

Commerce Clause challenges to use taxes are reviewed under the *Complete Auto* test. See *Holmes, supra.* The only prong of the *Complete Auto* test raised by Quill is the nexus requirement.[11] This first prong is closely related to the fourth prong of *Complete Auto,* which requires that the tax be fairly related to the benefits, opportunities, or services provided by the taxing state. Nexus has historically been analyzed as whether the state has provided some protection, opportunity, or benefit for which it can expect a return. See, e.g., *Bellas Hess, supra; Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940). Thus, we necessarily consider these two

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[11] Quill did not, in fact, place its arguments within the context of the *Complete Auto* test, which clearly governs review of a Commerce Clause challenge to a use tax. See *Holmes, supra.*

related prongs in determining the constitutionality of the use tax as applied to Quill.[12]

The Supreme Court has clarified that the Due Process requirement of a "minimal connection" to establish nexus is encompassed within the *Complete Auto* test. *Trinova Corp. v. Michigan Department of Treasury, supra; Amerada Hess Corp. v. Director, Division of Taxation,* 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). Thus, if the tax satisfies the nexus requirement of the *Complete Auto* test, it a fortiori satisfies the Due Process nexus requirement. *Amerada Hess, supra.*

As discussed in previous sections of this opinion, current Due Process and Commerce Clause analyses indicate that lack of physical presence within the taxing state is not the sole determinative factor in analyzing nexus questions. Rather, we must review all of Quill's contacts with the State to determine whether Quill has a sufficient nexus to satisfy constitutional standards.

Quill's activities directed toward North Dakota consumers clearly establish a substantial "presence" within the State. To iterate Quill's activities, it has 3,500 active customers in North Dakota, and its annual sales of nearly $1,000,000 make it the sixth largest seller of office supplies in the State. It annually mails over 60 different catalogs and flyers to its North Dakota customers, accounting for 230,000 separate pieces of mail. Quill also

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[12] No assertion has been made that the use tax is not fairly apportioned or that it discriminates against interstate commerce. Thus, the second and third prongs of the *Complete Auto* test need not be addressed.

has a "help line" for consumers to call if they have questions or problems with merchandise ordered from Quill, and specialized service representatives are available to assist with custom printing orders or to answer questions about computers available from Quill. Quill has availed itself of modern technology to engage in an extensive continuous, and intentional solicitation and exploitation of the State's consumer market and has thereby established an ubiquitous presence in the State.

Quill has a further connection with North Dakota which supports a finding of nexus. Quill licenses to some of its North Dakota customers a computer software program, Quill Service Link ["QSL"], which permits customers direct computer access to Quill's computer. This allows customers to check Quill's available inventory, confirm current price, and order merchandise directly by computer. Customers with QSL can also communicate with Quill and other customers through an electronic "bulletin board."

Quill retains all rights in QSL through the license agreement. Quill also retains the right to terminate the license "forthwith without prior notice and without cause," and upon termination the customer must "immediately return Software, and copies thereof and the user documentation to Quill." The explicit terms of the licensing agreement belie Quill's assertion that it merely sells the software – lock, stock, and barrel – to the customer. Through its licensing agreement, Quill clearly retains

rights to property situated in North Dakota,[13] providing further nexus with the State. See *Matter of Heftel*

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[13] The State argues that Quill owns other property in North Dakota, providing a further showing of nexus and benefits. The State asserts that Quill makes sales on approval in North Dakota and retains title to the goods until the merchandise is accepted or rejected by the buyer. Thus, the State argues, Quill owns property within the State which receives fire and police protection, as well as other benefits.

Quill's catalog makes the following offer to customers:

> "Use any product from Quill in your office FREE for 30 days. During that time, try it, inspect it, use it . . . just to be sure you're satisfied with the product. You have no reason to pay us and can return it during that period for any reason . . . no questions asked . . . and we'll give you a full credit against your invoice."

In addition, customers may, at any time within 90 days of purchase, return any item for a full refund if not completely satisfied.

Section 41-02-43(1), N.D.C.C., [U.C.C. § 2-326] provides:

> "*Sale on approval and sale or return – Consignment sales and rights of creditors.*
>
> "1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> "a. A 'sale on approval' if the goods are delivered primarily for use.
>
> "b. A 'sale or return' if the goods are delivered primarily for resale."

If a transaction constitutes a sale on approval under Section 41-02-43(1), title to the goods does not pass until the buyer accepts them. Section 41-02-44(1)(a), N.D.C.C.

Quill asserts, however, that its sales are not "sales on approval" because it does not offer an "unconditional guarantee of refund" and because in some cases the buyer must pay the return shipping costs.

Broadcasting Honolulu, Inc., 57 Hawaii 175, 554 P.2d 242 (1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977).

Quill asserts, however, that the State has provided no protections, benefits or opportunities which justify imposition of the duty to collect and remit the use tax. Quill would have us limit our consideration to solely property-protection functions of the State, such as fire and police protection, in determining whether the State has given something for which it may ask a return. However, just as the Court's cases of the past 25 years have broadened the concept of nexus, so too have recent cases suggested an expanding view of the benefits which may support State taxation. See, e.g., *Goldberg, supra; Holmes, supra.* Such intangible factors as the benefit of a trained work force and the "other advantages" of a civilized society have been cited by the Court to support imposition of taxes. See, e.g., *Amerada Hess, supra; Goldberg, supra; Holmes, supra.* The Court, in upholding a tax on an out-of-state seller, has also noted Justice Holmes' declaration that "government is the prerequisite for the fruits of civilization for which . . . we pay taxes," and that, accordingly, it

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The district court summarily rejected the State's argument and ruled that, as a matter of law, title to the merchandise passed to the purchaser immediately at the time of shipping. Although the court's ruling was wholly conclusory and failed to fully take into account the underlying factual issues necessary to a determination of the legal issues, we find it unnecessary to resolve this issue at this time. Because we have held that sufficient nexus exists to support imposition of the duty to collect and remit the use tax, we need not determine if Quill has additional nexus with the State through retention of title to goods sold on approval.

was the state that had made the seller's earnings possible. *Wisconsin v. J.C. Penney Co., supra,* 311 U.S. at 446, 61 S.Ct. at 250, 85 L.Ed. at 271.

Various commentators have noted that the benefits and opportunities considered in determining nexus should include economic benefits and opportunities conferred by the State. See, e.g., Hartman, Federal Limitations, *supra,* at §§ 2:7 and 10:8; Hartman, *Collection of the Use Tax, supra;* McCray, *Overturning Bellas Hess, supra;* Simet, *The Concept of "Nexus,", supra;* Note, *Imposition of the Duty to Collect State Use Taxes: Constitutional Prohibitions Are No Longer Valid in Mail Order Sales,* 32 S.D.L.Rev. 93 (1986). The underlying rationale is that these benefits and opportunities bear a more direct relationship to the generation of sales for the mail order seller than the comparatively inconsequential benefits and protections provided for a seller's property or personnel within the State. Whether or not an out-of-state seller has a physical presence within the State, it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services.

The theory has been summarized by Professor Emeritus Hartman:

> "An unrealistic facet of the *Bellas Hess* doctrine is that the Court presumably thought that a few 'warm bodies' in the taxing state – either operating from an office, or traipsing around hawking their wares without any in-state office – constitute a more satisfactory nexus with a state, for constitutional purposes, than other more substantial and meaningful connections.

> Benefits from the taxing state that are unrelated to physical contact with the state may be of vastly greater significance than those derived from the presence of a whole swarm of the out-of-state seller's agents soliciting business. Practically speaking, some form of physical presence within the state in furtherance of a business purpose is not essential to the existence of a meaningful nexus with the state. . . .
>
> "For use tax collection purposes, the connection or nexus between the taxing state and out-of-state mail-order sellers should be an economic, rather than physical, relationship. When an out-of-state mail-order seller, for the purpose of realizing a profit, takes advantage of the taxing state's economic climate and milieu through systematic, continuous, and large-scale solicitation of that state's consumer market, that activity should constitute a connection or nexus sufficient to require the out-of-state seller to collect the use tax. When the state provides a substantial economic benefit to the production of income for the out-of-state seller, the taxing state should be able to demand a tithe from the seller." Hartman, *Collection of the Use Tax, supra,* 39 Vand.L.Rev. at 1013-1014.

Other benefits provided by the state to the mail order seller have also been noted:

> "[I]f the buyer is a typical mail order consumer who remains passive in a transaction and does not enter the seller's state, actively initiate contact, negotiate substantial terms of a transaction, or undertake on-going business relationships with the seller, he is not deemed subject to the jurisdiction of the seller's state in a breach of contract action. Sellers are also prohibited from

> bringing suits in their own states against out-of-state buyers because of a Federal Trade Commission order enjoining such suits as unfair trade practices. A mail order seller may thus enforce his legal rights against a delinquent or fraudulent buyer *only* in the courts of the buyer's state. Thus it is the buyer's state that protects the revenues of the out-of-state seller.
>
> "The buyer's state also benefits the seller by assuring him an orderly market through consumer protection and usury laws on mail order transactions. Such laws create consumer confidence and eliminate unscrupulous sellers from the market. Consumer confidence is critically important to sales which cross state lines. In mail order transactions, consumers must rely heavily on state enforcement mechanisms to rectify wrongs and enforce rights." McCray, *Overturning Bellas Hess, supra,* 1985 B.Y.U.L. Rev. at 285.

An additional indispensable service is provided by the State: it disposes of the 24 tons of solid waste contributed annually to North Dakota landfills by Quill's catalogs and flyers. Although a similar argument was recently rejected in *SFA Folio Collections, Inc. v. Bannon,* 217 Conn. 220, 585 A.2d 666 (1991), we do not find the reasoning of that case persuasive. The court's discussion of the issue, in total, states:

> "The commissioner's argument that Folio derives benefit from Connecticut by virtue of the state disposing of the catalogs as paper trash is likewise without merit. Because the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must

contribute to the cost of the disposal." *SFA Folio Collections, Inc. supra,* 585 A.2d at 671 n. 6.

The court's rationale is far too simplistic. To suggest that the seller derives no benefit from the State's waste-collection efforts because theoretically the catalogs become the consumer's "property" when they reach the mailbox ignores the realities of the situation, and fails to take into account that most mail order solicitations have not been requested, and may in fact be unwanted, by the consumer.[14] It is the mail order seller who derives the most direct benefit from its own mailings, and it therefore is not unreasonable to assume that the seller derives some measure of benefit from the entity that is ultimately responsible for disposing of the veritable mountain of trash created thereby.[15] Certainly the benefit is as direct and consequential as the benefits provided by fire and police protection afforded to an independent contractor solicitor within the state, which have been found sufficient to uphold taxation. See *Tyler Pipe, supra.*

In response to the Connecticut court's rationale it might also be pointed out that, even if we accept the argument that catalogs and flyers become the consumer's property when they are received and that the consumer must therefore contribute to the cost of their disposal, it

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[14] It is estimated that 44% of all such direct mail solicitations are disposed of unopened and unread. *Time,* November 26, 1990, at p. 64.

[15] Recent estimates indicate that such "junk" mail "is now a nearly 4 million-ton colossus that accounts for 39% of all U.S. postal volume. This year about 41 lbs. of junk mail have been generated for each adult American." *Time,* November 26, 1990, at pp. 63-64.

is the consumer, not the out-of-state seller, who bears the ultimate burden of the use tax. The benefit that the mail order seller receives through the waste collection and disposal services of the state are certainly direct enough to support imposition of the purely administrative burden of collecting and remitting the use tax. See *National Geographic, supra.*

Quill also derived other benefits from the State. Because Quill retained ownership rights in its QSL software and accompanying user documentation, Quill received fire and police protection for its property within the State. The record also demonstrates that Quill contacted North Dakota financial institutions to check credit information on customers, an activity furthered by State regulation of the banking industry.

We conclude that Quill's significant economic presence within the State and its retained ownership of property within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax. We also conclude that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax. Accordingly, the use tax as applied to Quill satisfies the four-prong test of *Complete Auto* and does not violate the Due Process Clause or the Commerce Clause.

Because we hold that the State may constitutionally require Quill to collect and remit use tax on its North Dakota sales, the State's conduct provides no basis for relief under 42 U.S.C. §§ 1983 and 1988. It is therefore unnecessary to address Quill's cross-appeal.

The judgment of the district court is reversed and we remand for entry of a judgment declaring that Quill is a "retailer maintaining a place of business in this state" required to collect and remit use tax in accordance with Chapter 57-40.2, N.D.C.C.

ERIKSTAD, C.J., and LEVINE, MESCHKE and GIERKE, JJ., concur.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP, Plaintiff,	)	ORDER FOR JUDGMENT
vs.	)	
QUILL CORPORATION, Defendant.	)	

The above entitled matter having come before the Court on a motion for partial summary judgment by the Defendant, and a cross-motion for summary judgment by the Plaintiff, the parties having appeared through counsel of record and having filed briefs in support of and in opposition to the respective motions and having presented oral arguments to the Court, the Court being fully advised in the premises herein and having issued its Memorandum Opinion herein on May 15, 1990, wherein the Court held that application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Defendant Quill Corporation was in violation of the United States Constitution and accordingly said statutes were declared invalid as applied to Quill Corporation; the Court now makes the following ORDER:

1. The Defendant's motion for partial summary judgment is granted;

2. The Plaintiff's cross-motion for summary judgment is denied;

3. The Defendant shall recover its costs according to North Dakota law, but its counterclaim seeking attorneys' fees under 42 U.S.C. § 1988 is denied; and

4. The Clerk is directed to enter judgment in accordance with this Order.

Dated this 11th day of June, 1990.

BY THE COURT:

[Signed]

BENNY A. GRAFF
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Civil No. 41677

STATE OF NORTH DAKOTA, by and through its TAX COMMISSIONER, HEIDI HEITKAMP,

Plaintiff,

vs.

QUILL CORPORATION,

Defendant.

JUDGMENT

Pursuant to the Order for Judgment entered and filed herein, it is

ADJUDGED AND DECREED that the Defendant Quill Corporation is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use tax on its mail-order sales, as application of N.D.C.C. § 57-40.2-01(6) and § 57-40.2-01(7) to Quill Corporation is in violation of the United States Constitution and said statutes are invalid as applied to Quill Corporation; that the Defendant shall recover its costs according to North Dakota law; and that the Defendant's counterclaim is dismissed with prejudice.

WITNESS, The Honorable Benny A. Graff, District Judge, South Central Judicial District, Burleigh County, North Dakota, and my hand and the seal of said Court, this 11th day of June, 1990.

[Signed]
Marian Barbie
Clerk of the District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP, Plaintiff, -v- QUILL CORPORATION, Defendant.	CIVIL NO. 41677 MEMORANDUM OPINION

This action brought by the State of North Dakota seeks to have the Quill Corporation declared a "retailer" for purposes of applying the North Dakota Sales and Use Tax on the distribution of Quill's products in our state. The Answer of Quill admits most of the facts alleged by the State, but specifically denies they are required to obtain a certificate of authority to do business in our state or that they are liable to remit a use tax on the products sold here. They specifically claim that the Tax Commissioner is acting in violation of the commerce clause of the United States Constitution.

The basis for taxation of products in North Dakota is Section 57-40.2-01(6) which amended the definition of "retailer" in 1987 to read as follows:

> "A retailer also includes every person who engages in regular or systematic solicitation of a

> consumer market in this state by the distribution of catalogs, periodicals, advertising fliers or other advertising, or by means of print, radio or television media, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system."

The facts of this matter show that Quill is a Delaware Corporation with its principal place of business in Illinois, with additional offices and warehouses in California. Quill solicits sales of merchandise through catalogs and advertising flyers mailed to customers throughout North Dakota from locations outside of North Dakota Quill does not maintain any office, distribution house, sales house, warehouse or any other place of business in North Dakota; it does not have any agent, salesmen, or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells here; it does not have any telephone listing or toll free telephone line, and does not advertise by any radio or television media in North Dakota; it does not advertise in any newspapers distributed in North Dakota, nor solicit business in any fashion other than by catalog or flyer. All of the business conducted in North Dakota is done by United States mail, telephone or common carrier.

The point at which the parties depart in their interpretation of the facts is whether Quill has any real or personal tangible property in the State of North Dakota. The argument advanced by the state is that since Quill sells all of its items with an unequivocal ninety day guarantee, Quill remains the owner of such property until this approval period expires. Quill, on the other hand,

claims that title passes at the time the property is shipped from their outlets in Illinois or California.

It seems clear to the Court that the case of *Hess v. Illinois*, 386 US 753 (1967) prohibits this type of legislation. In *Hess*, the facts are very similar to those found in this case. Hess was a mail order house with its principal place of business in Missouri. Its sales to Illinois residents were substantial. Hess's manner of doing business in Illinois was similar to that of Quill in this case. The Supreme Court of the United States ultimately stated that there was insufficient nexus with the Hess Corporation to tax the sales that were taking place through the use of the mails.

In attempting to differentiate itself from that decision, the State, in this case, has chosen to identify the ninety-day guarantee as a "sale on approval". This argument has been advanced in numerous other states without success, and the Court finds no reason to adopt that theory here. I am satisfied that title changes hands at the time of the mailing, and that the risk on the items sold in this manner fall upon the purchaser in North Dakota at the time they receive the property, and not ninety days later as the state suggests.

Many of the arguments made by the State in this case are merely restatements of the remarks made by Mr. Justice Fortas in the *Hess* case. His dissent very logically sets forth reasons why *Hess* should have been taxed in Illinois, but the Supreme Court in that case failed to adopt his arguments. Although I find the arguments quite persuasive, this is not the law of the United States nor of the State of North Dakota.

Hess does, however, set forth the rationale for state taxation on interstate commerce. These concepts are set forth in the decision and read as follows:

> "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of a local government whose protection it enjoys. . . . And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the simple but controlling question is whether the state has given anything for which it can ask return." See *Hess* at page 756.

Rather than dwell on the intricacies of title passing as the State has done in this case, they should have been presenting facts to the Court showing that the State of North Dakota spends funds for the protection and benefit of the mail order business. By doing so, they could show that taxation was not only for the benefit of local residents, but for the benefit of the mail order houses. Until these facts can be obtained, there is no nexus to allow the state to define retailer in the manner it chose. The mere fat that this appears to be unfair to the local retailers cannot be a determining factor in this case. The focus must be on the beneficiary of the taxes as opposed to the consequences. Until this can be established, it would appear that the tax dollars spent protects the local resident and does not benefit the out of state mail order business in any significant manner.

The State, during argument, urged that the reasoning of *Goldberg v. Sweet*, 488 US ___ 102 LEd 2d 607, 109 S Ct 582 (1989), extends the taxing arm of the State to Quill.

However, the primary difference in that case is that the parties stipulated Illinois had a substantial nexus with the interstate telecommunications reached by the Tax Act. That is precisely the issue in controversy in this case, and on which I fail to find any presence (nexus) of Quill in North Dakota.

Based on the foregoing, the language heretofore quoted in Section 57-40.2-01(6) and that found in subsection 7 is declared to be in violation of the United States Constitution and accordingly declared invalid as applied to Quill.

Counsel for the defendant may prepare the appropriate Order for Summary Judgment granting relief to them. The Court does not grant attorney's fees to the defendant, but only costs.

Dated: May 15, 1990
At Bismarck, North Dakota

BY THE COURT:

/s/ Benny A. Graff
Benny A. Graff, District Judge

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. ___

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, Plaintiff,	)	
vs.	)	COMPLAINT
Quill Corporation, Defendant.	)	

Plaintiff, State of North Dakota, through its Tax Commissioner, Heidi Heitkamp, for its demand for relief, alleges:

I.

Quill Corporation ("Quill") is a privately owned corporation.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

III.

Quill is in the business of direct mail order sales throughout the United States.

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.2-07.

VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not

have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

IX.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.2-01 and 57-40.2-07.

X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

WHEREFORE, the State of North Dakota, through its Tax Commissioner, respectfully requests that the court declare that Quill is a "retailer" and a "retailer maintaining a place of business in this state." The State also requests executory relief to require Quill to obtain a North Dakota sales and use tax permit and collect and remit all tax, penalty and interest due from July 1, 1987.

Dated this 7th day of July 1989.

State of North Dakota
Nicholas J. Spaeth
Attorney General

/s/ Carla J. Smith
Carla J. Smith
Assistant Attorney General
Office of State Tax Commissioner
State Capitol-Eighth Floor
600 East Boulevard Avenue
Bismarck, North Dakota 58505

EXHIBIT A

May 5, 1989

Mr. Jack Miller, President
Quill Corporation
P.O. Box 5900
Lincoln Shore, Illinois 60179-5900

Mr. Arnold Miller, Treasurer
Quill Corporation
P.O. Box 5900
Lincoln Shore, Illinois 60179-5900

Gentlemen:

The North Dakota sales and use tax law defines "retailer" and "retailer maintaining a place of business" as "every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system." (Attachment 1)

Any company qualifying as a North Dakota retailer under this definition must hold a North Dakota sales and use tax permit and collect and remit use tax on taxable goods sold in North Dakota.

North Dakota Century Code §57-40.2-07 provides "any retailer maintaining a place of business in this state . . . shall obtain a permit from the commissioner. . . . " The North Dakota Administrative Code §81-04.1-01-03.1 states that "[a]ny person having nexus in North Dakota and making taxable sales in or making taxable sales having a destination in North Dakota must obtain a North Dakota sales and use tax permit from the tax commissioner and collect and remit tax on these sales." (Attachment 2)

Based on a review of your North Dakota sales activity, your company is required to hold a North Dakota sales and use tax permit and collect and remit use tax on sales made into North Dakota. Enclosed is a North Dakota sales and use tax permit application. This form must be completed and returned to the Tax Commissioner's office by June 9, 1989. North Dakota sales and use tax collections should begin immediately.

Please contact me at (701) 224-3470 with any questions you may have. I will be happy to assist you in any way.

Sincerely,

Walter M. Stack
Director
Sales and Special Taxes

WMS:mdm
Attachments
cc: Heidi Heitkamp
Tax Commissioner

MAILED CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

(Attachments omitted in printing)

EXHIBIT B

(Letterhead Of)

QUILL CORPORATION
100 South Schelter Rd.
Lincolnshire, IL 60069
(312) 634-4850

May 12, 1989

Mr. Walter M. Stack, Director
Sales and Special Taxes
State of North Dakota
Office of State Tax Commissioner
Bismarck, North Dakota 58505

Dear Mr. Stack:

In response to your letter of May 5, 1989, this is to inform you that Quill Corporation is engaged in the mail order sales of office supplies and equipment conducted exclusively from the States of Illinois and California. Quill Corporation owns no property and has no employees located outside of Illinois and California.

Neither Quill Corporation nor any representative of Quill Corporation conducts any business activities, maintains a place of business, or owns or leases property in North Dakota. Consequently, Quill Corporation is not subject to North Dakota income or sales taxes and is not required to collect (nor does it collect) North Dakota sales taxes.

If you have any further questions, please contact me.

Very truly yours,

QUILL CORPORATION

/s/ Arnold Miller
Arnold Miller
Treasurer

AM/sk

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Heidi Heitkamp, Plaintiff, vs. QUILL CORPORATION, Defendant.	ANSWER AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendant, Quill Corporation ("Quill"), by its attorneys, McDermott, Will & Emery and Pearce and Durick, in answer to Plaintiff's Complaint admits, denies and alleges as follows:

I.

Quill Corporation ("Quill") is a privately owned corporation.

ANSWER TO PARAGRAPH I:

Admits the allegations of paragraph I of Plaintiff's Complaint.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

ANSWER TO PARAGRAPH II:

Admits the allegations of paragraph II of Plaintiff's Complaint. Quill alleges that it also maintains a warehouse in Ontario, California.

III.

Quill is in the business of direct mail order sales through out the United States.

ANSWER TO PARAGRAPH III:

Denies the allegation of paragraph III of Plaintiff's Complaint on grounds that the phrase "direct mail order sales" is vague. Quill admits that it solicits orders of merchandise through the use of catalogs and advertising flyers which are mailed from locations outside North Dakota to customers located throughout the United States; it receives and accepts all orders for merchandise either in Illinois or California; and it ships merchandise from locations outside North Dakota to customers located throughout the United States either by mail or common carrier.

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

ANSWER TO PARAGRAPH IV:

Admits the allegations of paragraph IV of Plaintiff's Complaint. Quill alleges that it is not transacting business in North Dakota pursuant to N.D.C.C. § 10-22-01 and is

not required to procure a certificate of authority from or register with the Secretary of State of North Dakota.

V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

ANSWER TO PARAGRAPH V:

Denies the allegations of paragraph V of Plaintiff's Complaint, except that Quill admits that catalogs and advertising flyers are mailed via the United States post office from locations outside of North Dakota to persons located throughout the United States, including North Dakota.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-01-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

ANSWER TO PARAGRAPH VI:

Denies the allegations of paragraph VI of Plaintiff's Complaint.

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.02-07.

ANSWER TO PARAGRAPH VII:

Denies the allegations of paragraph VII of Plaintiff's Complaint.

VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

ANSWER TO PARAGRAPH VIII:

Admits the authenticity of the letters attached as Exhibits A and B. Quill neither admits nor denies the other allegations of paragraph VIII of Plaintiff's Complaint on the grounds that the writings speak for themselves.

XI.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to

collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.201 [sic] and 57-40.2-07.

ANSWER TO PARAGRAPH IX:

Denies the allegations of paragraph IX of Plaintiff's Complaint, except that Quill admits that a justiciable controversy exists regarding the constitutionality of N.D.C.C. §§ 57-40.2-01 and 57-40.2-07 as applied to Quill.

X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

ANSWER TO PARAGRAPH X:

Denies the allegations of paragraph X of Plaintiff's Complaint, except that Quill admits that this action is brought pursuant to N.D.C.C. Chapter 32-23.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its First Affirmative Defense alleges as follows:

1. Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill warehouses merchandise only in the States of Illinois and California. Quill does not own or control any corporation

or other entity and is not owned or controlled by another corporation or entity.

2. Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.

3. Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.

4. All orders are received and accepted by Quill in Illinois or California.

5. All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.

6. Quill does not own any tangible property, real or personal, in North Dakota.

7. Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

8. Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

9. Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

10. All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden upon interstate commerce in violation of the Commerce Clause (article 1, section 8, clause 3 of the United States Constitution), *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the following reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales and use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

SECOND AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its Second Affirmative Defense alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Second Affirmative Defense.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden on Quill in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the foregoing reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *National Bellas*

Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

COUNTERCLAIM

Quill, by its attorneys, as its counterclaim against the State of North Dakota and its Tax Commissioner Heidi Heitkamp, alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Counterclaim.

11. Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

12. Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax

Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

WHEREFORE, Quill prays as follows:

A. That this Court declare N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) unconstitutional as applied to Quill.

B. That this Court find that the State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, acting under color of North Dakota law, intentionally denied Quill of its rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution in violation of 42 U.S.C. § 1983.

C. That this Court enter a judgment against the State of North Dakota, the Office of the State Tax Commissioner under 42 U.S.C. § 1988 for the attorneys' fees and other costs incurred by Quill in defending itself from Plaintiff's attempt to deprive Quill of its constitutional rights and privileges without due process of law.

QUILL CORPORATION
By: /s/ John E. Gaggini
John E. Gaggini

John E. Gaggini
Don S. Harnack
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
(312) 372-2000

By: /s/ William P. Pearce
William P. Pearce

William P. Pearce
Pearce and Durick
314 East Thayer Avenue
Bismarck, North Dakota 58502
(701) 223-2890

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 41677

State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, Plaintiff, vs. Quill Corporation, Defendant.	)	PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM

The North Dakota Office of Tax Commissioner, through its attorney Carla J. Smith, Answers the Defendant's Counterclaim as follows:

COUNTERCLAIM NO. 1:

Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill does not own or control any corporation or other entity and is not owned or controlled by another corporation or entity.

ANSWER TO COUNTERCLAIM NO. 1:

Plaintiff admits that the Defendant's principal place of business is in Lincolnshire, Illinois. The Plaintiff does not possess sufficient information to admit or deny the remaining allegations in paragraph 1 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 2:

Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.

ANSWER TO COUNTERCLAIM NO. 2:

Plaintiff admits that Quill mails catalogs and advertisement flyers to customers located throughout the United States, including customers in North Dakota. The Plaintiff does not possess sufficient information to admit or deny the remaining allegations in paragraph 2 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 3:

Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.

ANSWER TO COUNTERCLAIM NO. 3:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 3 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 4:

All orders are received and accepted by Quill in Illinois or California.

ANSWER TO COUNTERCLAIM NO. 4:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 4 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 5:

All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.

ANSWER TO COUNTERCLAIM NO 5:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 5 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 6:

Quill does not own any tangible property, real or personal, in North Dakota.

ANSWER TO COUNTERCLAIM NO. 6:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 6 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO 7:

Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

ANSWER TO COUNTERCLAIM NO. 7:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 7 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 8:

Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative

to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

ANSWER TO COUNTERCLAIM NO. 8:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 8 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 9:

Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

ANSWER TO COUNTERCLAIM NO. 9:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 9 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 10:

All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

ANSWER TO COUNTERCLAIM NO. 10:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 10 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 11:

Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and

N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

ANSWER TO COUNTERCLAIM NO. 11:

The Plaintiff denies the allegations in paragraph 11 of the Counterclaim.

COUNTERCLAIM NO. 12:

Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article I, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

ANSWER TO COUNTERCLAIM NO. 12:

The Plaintiff denies the allegations in paragraph 12 of the Counterclaim.

AFFIRMATIVE DEFENSES

The Plaintiff, through its attorney, for its Affirmative Defenses alleges:

I.

The Defendant's claim against the Plaintiff in her official capacity as Tax Commissioner for the State of North Dakota is barred by the Eleventh Amendment of the United States Constitution and the Doctrine of Sovereign Immunity.

II.

The Defendant's claim as it may relate to Heidi heitkamp individually is barred as she is entitled to qualified immunity under 42 U.S.C. §1983.

III.

The Defendant's claim fails to state a claim upon which relief may be granted.

WHEREFORE, the Plaintiff respectfully requests that the Defendant's Counterclaim be dismissed.

Dated this 7th day of September 1989.

State of North Dakota
Nicholas J. Spaeth
Attorney General

/s/ Carla J. Smith
Carla J. Smith
Assistant Attorney General
Office of State Tax Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0599
(701) 224-2781

Federal Statutes Prohibiting or Restricting State and Local Taxation

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4 U.S.C. § 113

Member of Congress not subject to income taxation by state where she/he resides for purposes of attending Congress.

5 U.S.C. § 8434

No state or local tax on amounts paid to purchase annuitites under federal employees' retirement system.

7 U.S.C. § 1511

Federal Crop Insurance Corporation exempt from state and local taxation.

7 U.S.C. § 2013

States may not participate in food stamp program if purchases made with food stamps are subject to state or local sales tax.

12 U.S.C. § 531

Federal reserve banks exempt from state and local taxation (except real estate taxes).

12 U.S.C. § 1433

Notes, bonds and other obligations issued by any Federal Home Loan Bank exempt from state and local taxes (except estate, inheritance and gift taxes). Federal Home Loan Bank itself exempt from state and local taxes (except real property taxes).

12 U.S.C. § 1441b(f)(7)

Obligations of Resolution Funding Corporation exempt from tax to same extent as Federal Home Loan Bank obligations under 12 U.S.C. § 1433.

12 U.S.C. § 1723a(c)

FNMA and GNMA exempt from all state and local tax except for real property taxes.

12 U.S.C. § 1768

Federal credit unions exempt from state and local taxes (except real and tangible personal property taxes).

12 U.S.C. § 1795k

Central Liquidity Facility (for federal credit unions) exempt from state and local taxes (except real property taxes). Central Liquidity Facility obligations exempt from state and local taxes (except gift, inheritance or estate taxes).

12 U.S.C. § 1825

FDIC obligations exempt from state and local taxes (except estate and inheritance taxes). FDIC itself exempt from state and local taxes (except real property taxes).

12 U.S.C. § 2023

Farm Credit Banks and obligations issued by banks exempt from state and local taxation (except real property taxes).

12 U.S.C. § 2077

Production credit associations' obligations exempt from state and local taxation (except estate, inheritance and gift taxes).

12 U.S.C. § 2098

Federal land bank associations and their obligations exempt from state and local taxation (except real estate taxes).

12 U.S.C. § 2134

Bank for cooperatives (part of Farm Credit System) obligations exempt from state and local tax (except estate, inheritance and gift taxes).

12 U.S.C. § 2277a – 12

Farm Credit System Insurance Corporation exempt from state and local taxes (except real property taxes).

12 U.S.C. § 2279g

Farm Credit System mergers not to trigger state property tax reassessment or transfer tax.

12 U.S.C. § 2290

Federal Financing Bank exempt from state and local taxes (except real property taxes).

12 U.S.C. § 3019

National Consumer Cooperative Bank exempt from state and local taxes (except real property taxes).

15 U.S.C. § 78kkk

Securities Investor Protection Corporation exempt from state and local taxes (except real and tangible personal property taxes).

15 U.S.C. §§ 381 & 382

P.L. 86-272. No state income tax where sole contact with state is solicitation.

15 U.S.C. § 391

No state of local tax on generation or transmission of electricity discriminatory against interstate commerce.

15 U.S.C. § 713a-5

Commodity Credit Corp. obligations exempt from state and local taxes (except estate, inheritance and gift taxes). CCC itself exempt from state and local taxes (except real property taxes).

16 U.S.C. § 831n-4(d)

Bonds issued by the TVA exempt from state and local taxes (except estate, inheritance and gift taxes).

22 U.S.C. § 290h-4

African Development Foundation exempt from state and local taxes.

25 U.S.C. § 71

No state or local taxes on income from exercising rights to fish under Indian treaty if no federal tax allowed.

29 U.S.C. § 1144

ERISA supersedes state laws relating to employee benefit plans, including tax laws.

29 U.S.C. § 1302(g)(1)

PBGC exempt from state and local taxes (except real and tangible personal property taxes).

29 U.S.C. § 1707

No gross receipts-based taxes on contractors under Job Corps Center programs, and no sales or use tax due or collectible.

31 U.S.C. § 3124

Stocks and obligations of the U.S. government exempt from state and local taxes (except non-discriminatory franchise taxes on corporations and estate or inheritance taxes).

38 U.S.C. § 1969

No state or local tax on premiums for veterans' insurance policy.

42 U.S.C. § 1786(c)(4)

State can't participate in child nutrition/special supplemental food program if purchases made under program are subject to state or local sales tax.

43 U.S.C. § 1333(a)(2)(A)

State taxation laws shall not apply to the outer continental shelf.

43 U.S.C. § 231m(a)

Annuities under Railroad Retirement Act exempt from state and local taxes.

45 U.S.C. § 546b

National Railroad Passenger Corp. exempt from state and local taxes.

45 U.S.C. § 581(c)(3)

Amtrak Commuter Services Corp. exempt from state and local taxes to same extent as National Railroad Passenger Corp. under § 546(n).

45 U.S.C. § 727(c)

Consolidated Rail Corp. exempt from state tax.

45 U.S.C. § 1106(a)(1)

Transfers or conveyances of any interests in rail property made pursuant to federal railroad laws regarding the Northeast Rail Service exempt from state and local taxes.

46 U.S.C. § 11108

Wages due a master or seaman on a vessel in foreign or interstate trade or an individual employed on a fishing or fish processing vessel may not be withheld under state or local laws.

48 U.S.C. § 745

Bonds issued by Puerto Rico exempt from state and local taxation.

48 U.S.C. § 1403

Bonds issues by U.S. Virgin Islands exempt from state and local taxation.

48 U.S.C. § 1423a

Bonds issued by Guam exempt from state and local taxation.

49 U.S.C. §§ 11503, 11503a, and 11504

Regulate state and local taxation of rail transportation property, motor carrier transportation property, and rail carrier and motor carrier employees.

49 U.S.C. Appendix § 1512

Regulates state and local income taxation of employees of air carriers.

49 U.S.C. Appendix § 1513

Restricts state or local taxation of air commerce.

50 U.S.C. Appendix §§ 560, 573, 574, 584 and 590

Regulate state and local taxation of military personnel.

States with Statutory Provisions Awarding Damages and/or Attorneys Fees

Arizona	Rev. Stat. Ann. § 12-348
Arkansas	Stat. Ann. § 26-18-809
California	Rev. & Tax. Code §§ 21013 and 21021
Connecticut	Gen. Stat. Ann. § 4-184a
Florida	Stat. §§ 213.015 and 57.105
Idaho	Code §§ 63-4011 and 12-117
Illinois	20 ILCS 2520/5 and 7 and 5 ILCS 100/10-55
Iowa	Code §§ 625.1 and 625.29
Kansas	Stat. Ann. § 79-3268
Kentucky	Rev. Stat. § 131.081
Maryland	Stat Gov't Code Ann. § 10-217
Massachusetts	Gen. Law. Ann. Ch. 12, §§ 11H and 11I
Michigan	Comp. Laws Ann. § 205.7
Minnesota	Stat. §§ 14.62 and 3.762
Missouri	Rev. Stat. § 136.315
Montana	Code Ann. §§ 15-1-222 and 25-10-711
Nebraska	Rev. Stat. § 25-1803
New Hampshire	Rev. Stat. Ann. § 541-B:18
New Jersey	Rev. Stat. § 54:51A-23
New Mexico	Stat. Ann. § 7-1-25
New York	Civ. Prac. Law § 8601
Ohio	Rev. Code Ann. § 5703.54
Oklahoma	Stat. tit. 68, § 226
Oregon	Rev. Stat. §§ 305.447 and 305.490
Pennsylvania	Stat. Ann. tit. 71, § 2033
South Carolina	Code Ann. § 12-54-870
South Dakota	Codified Laws Ann. § 10-59-34
Tennessee	Code Ann. § 67-1-1803
Utah	Code Ann. § 59-1-1005
Virginia	Code § 9-6.14:21
Washington	Rev. Code § 82-32A.020
West Virginia	Code § 11-10-14b
Wisconsin	Stat. § 227.485

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Supreme Court, U.S.
FILED
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No. 93-11

In The

Supreme Court of the United States

October Term, 1993

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Robert E. Hanson,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1988 applies to an action brought by the state under the state's declaratory judgment act to determine the constitutionality of applying a state tax statute to a corporation that has not paid or been assessed taxes under the statute.

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STATEMENT OF THE CASE

In July 1989 the State of North Dakota through its State Tax Commissioner ("Tax Commissioner") requested that Quill Corporation ("Quill") register as a retailer and begin collecting North Dakota use tax on its sales to North Dakota customers. App. 119-20. Quill refused. App. 121-22. The Tax Commissioner then initiated a declaratory action in district court asking the court to determine if Quill could be required to comply with North Dakota's sales and use tax statute. App. 116-19. Quill counterclaimed for declaratory relief under North Dakota law as well as for relief under 42 U.S.C. §§ 1983 and 1988. App. 123-33.

The North Dakota district court determined that under the rule expressed in *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967), the Tax Commissioner could not impose a use tax collection duty on Quill. App. 111-15. The district court dismissed Quill's claim for attorney's fees under sections 1983 and 1988. App. 115.

The North Dakota Supreme Court reversed the district court's decision. App. 68-107. Because of its disposition of the case, the court found it unnecessary to address Quill's section 1983 counterclaim. App. 106.

The action was subsequently heard by this Court, which held that requiring Quill to register as a retailer and collect North Dakota use tax on its sales to North Dakota customers would not violate the Due Process Clause but would violate the Commerce Clause. App. 24-66.

On remand, the North Dakota Supreme Court vacated that portion of its original opinion reversed by this Court and affirmed the judgment of the district court. App. 22-23. Quill petitioned for rehearing. App. 2. The North Dakota Supreme Court granted Quill's petition for rehearing on the issue of whether Quill is entitled to attorney's fees under 42 U.S.C. §§ 1983 and 1988 given the circumstances in this case. App. 3.

On rehearing, Quill conceded that its section 1983 claim would be barred in state court by the North Dakota Supreme Court's earlier decision in *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986). App. 5. In *Linderkamp* the North Dakota Supreme Court held that a taxpayer may not bring a section 1983 action in state court in matters relating to state taxation where an adequate state remedy is available. *Linderkamp*, 397 N.W.2d at 80. Quill also conceded on rehearing that North Dakota's Declaratory Judgment Act, N.D. Cent. Code ch. 32-23, provided an adequate state remedy. App. 5. Quill argued, however, that *Linderkamp* was abrogated by this Court's decision in *Howlett v. Rose*, 496 U.S. 356 (1990). App. 5. Quill further contended that the state court was required to hear its counterclaim even though its claim would be barred in federal court by the Tax Injunction Act, 28 U.S.C. § 1341, because Quill had a plain, speedy, and efficient remedy available at state law. App. 5.

The North Dakota Supreme Court upheld the district court's dismissal of Quill's section 1983 counterclaim and denied attorney's fees. App. 17. The court stated that its holding was consistent with the Supreme Court's decisions in *Howlett*, *Felder v. Casey*, 487 U.S. 131 (1988), and

Wilson v. Garcia, 471 U.S. 261 (1985), as well as its own decision in *Linderkamp*. App. 5-12. The court wrote:

> We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions challenging state tax administration when such actions would be barred in federal court. *Howlett*, *Felder*, and *Wilson* recognize that Congress intended that § 1983 be given a uniform application within each state. Accordingly, we read those cases as holding only that state rules that are outcome-determinative, in a manner inconsistent with federal law, will be violative of the Supremacy Clause. Application of the *Linderkamp* holding in this case to preclude a § 1983 action in state court that would be barred in federal court by the Tax Injunction Act is consistent with *Howlett*, *Felder*, and *Wilson*, and creates a uniform result in state and federal court.

App. 12.

The court then clarified that the *Linderkamp* rule "was based exclusively upon federal law and policy." App. 13. The court stated that its decision

> [recognizes] that the proscriptions of the Tax Injunction Act are based at least in part upon deference to state remedial schemes[. This] leads to the conclusion that a state court § 1983 action, which applies a federal remedial statute for alleged violations of federally-created rights, is no less of a burden upon the state remedial scheme than would be a § 1983 action brought in federal court.

App. 14 (*quoting Linderkamp*, 397 N.W.2d at 80).

REASONS FOR DENYING THE WRIT

I. BECAUSE THE NORTH DAKOTA SUPREME COURT DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OR DECISIONS OF THIS COURT, QUILL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The Decision Below Does Not Conflict With Decisions Of Other State Courts.

A careful reading of the facts and analyses in the state court decisions upon which Quill relies shows there is no true conflict among the states as to whether a section 1983 claim may be brought in state court under the circumstances presented in this case.

The primary case that Quill cites as conflicting with the North Dakota Supreme Court decision below is *Bloomingdale's by Mail, Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), *cert. denied*, 61 U.S.L.W. 3850 (U.S. June 21, 1993). *See Cert. Pet.* at 9-10.

In *Bloomingdale's* the Tennessee Supreme Court applied the holding in *Howlett v. Rose*, 496 U.S. 356 (1990), and decided that federal law prohibited any state law limitations on the award of attorney's fees in section 1988 cases. *Bloomingdale's*, 848 S.W.2d at 52. In that case the Tennessee Department of Revenue had issued an assessment of sales and use taxes to Bloomingdale's by Mail, Ltd. ("Bloomingdale's"). *Id.* at 56. As permitted by Tennessee law, Bloomingdale's then filed a complaint in state court to set aside the assessment. *Id.* The parties agreed that the constitutionality of the assessment was resolved by this Court's decision in *Quill Corp. v. North Dakota*, 112 S. Ct. 1904 (1992). *Bloomingdale's*, 848 S.W.2d at 52.

The issue decided in *Bloomingdale's* was whether state or federal law governed the award of attorney's fees in a case brought by a taxpayer to set aside a tax assessment. *Id.* at 53; *see also id.* at 57. The court held that section 1988 governed the award of attorney's fees and the Tennessee statute that put a limit on the award of attorney's fees could not be applied. *Id.* at 56-57. In contrast, the issue presented to and decided by the North Dakota Supreme Court was whether the state court was required to hear Quill's section 1983 counterclaim when no assessment had been made.

The Tennessee Supreme Court in *Bloomingdale's* recognized the distinction between the issue decided there and the issue decided below. A year before deciding *Bloomingdale's,* the Tennessee Supreme Court held that a state court did not have subject matter jurisdiction over a section 1983 claim brought by a taxpayer to challenge a state tax statute. *L.L. Bean, Inc. v. Bracey,* 817 S.W.2d 292 (Tenn. 1991). *L.L. Bean* was factually similar to this case in that the taxpayer had not received an assessment and had not paid any tax. *Id.* at 293. The *Bloomingdale's* court found this factual difference significant, stating:

> The issue in *L.L. Bean* was whether a chancery court had subject matter jurisdiction regarding a claim brought under 42 U.S.C. § 1983. The taxpayer in that case had not received an assessment, nor had it paid any taxes that it contested. . . .
>
> Unlike the taxpayer in *L.L. Bean,* Bloomingdale's by Mail, Ltd., had received an assessment and was properly before the chancery court. . . .

Bloomingdale's, 848 S.W.2d at 56. The *Bloomingdale's* court did not overrule *L.L. Bean*. Instead, the court concluded that the *L.L. Bean* holding was consistent with its decision. *Id.*

Given the similarity between *L.L. Bean* and the North Dakota Supreme Court's decision, and the fact that even the Tennessee Supreme Court in *Bloomingdale's* found no conflict between the *L.L. Bean* and *Bloomingdale's* decisions, Quill's reliance on *Bloomingdale's* to establish a conflict is misplaced.

Similarly, a review of the other cases Quill cites in support of its argument that a conflict exists among the state high courts reveals that this alleged conflict is illusory. Quill claims that there are six additional cases in which state courts of last resort have considered whether their courts must hear section 1983 claims in state tax cases, with four courts[1] deciding the question in the negative and two courts deciding in the affirmative. *Cert. Pet.* at 10. Quill's discussion of these cases ignores factual distinctions and oversimplifies or misrepresents the courts' holdings.

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[1] In fact, more than four state courts have held that state courts are not required to hear section 1983 claims in state tax cases unless the taxpayer has exhausted available administrative remedies. *See McManus v. Department of Revenue and Finance*, 499 N.W.2d 726 (Iowa 1993); *Dean v. State*, 826 P.2d 1372 (Kan.), *cert. denied*, 112 S. Ct. 2941 (1992); *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991), *cert. denied*, 112 S. Ct. 867 (1992); *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S. Ct. 867 (1992). These cases arose out of circumstances in which state taxes had been assessed or paid. *McManus*, 499 N.W.2d at 727; *Dean*, 826 P.2d at 1374-75; *Nutbrown*, 811 P.2d at 132-33; *Hogan*, 471 N.W.2d at 217.

Quill cites *Allison v. Board of County Comm'rs of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987), and *Marx v. Truck Renting and Leasing Ass'n, Inc.*, 520 So.2d 1333 (Miss. 1987), claiming that those decisions hold that the Tax Injunction Act does not permit state courts to refuse to entertain section 1983 challenges to state tax statutes. *Cert. Pet.* at 10. This is not an accurate statement of the holdings in those two cases. The basis for the decision in *Allison* was the inadequacy of the remedy available to the complaining taxpayers. *Allison*, 737 P.2d at 12. In *Marx* the court did not reach the issue of whether a state court must take jurisdiction of section 1983 claims in state tax cases, writing: "We need not consider whether the courts of this State must take and adjudge every § 1983 claim tendered to them. Today's case arises in the context of a trial court adjudication which did decide the § 1983 claim." *Marx*, 520 So.2d at 1346.

Quill claims the four following decisions conflict with *Allison* and *Marx*: *Zizka v. Water Pollution Control Auth.*, 490 A.2d 509 (Conn. 1985); *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (en banc); *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd*, 471 U.S. 82 (1985). All four cases are distinguishable from *Allison* and *Marx* as well as the instant case.

All four involved claims for refund of taxes paid or assessed under an unconstitutional taxing scheme. *Zizka*, 490 A.2d at 510-11; *Backus*, 224 S.E.2d at 372-73; *Stufflebaum*, 691 S.W.2d at 271; *Spencer*, 316 S.E.2d at 387. In this case, no taxes were paid or assessed. Further, at least three of these cases concerned whether a taxpayer must

exhaust available administrative remedies before bringing a section 1983 claim in a state court. *Zizka*, 490 A.2d at 512-14; *Backus*, 224 S.E.2d at 373-75; *Stufflebaum*, 691 S.W.2d at 271-72. The exhaustion issue is irrelevant when no tax has been paid or assessed.

The only similarity between the North Dakota Supreme Court decision and these four state courts' decisions is that all these courts recognize that a section 1983 action challenging a state tax system in state court is no less intrusive to a state's fiscal operations than an identical challenge in federal court.

Because the decision below does not conflict with the decision of any other state court of last resort, review by this Court is not warranted and certiorari should be denied.

B. The Decision Below Does Not Conflict With *Howlett v. Rose* Or Other Decisions Of This Court.

Contrary to Quill's assertion, the decision below does not conflict with *Howlett v. Rose*, 496 U.S. 356 (1990).

Howlett involved a section 1983 claim brought by a former high school student against a school board and three school officials alleging a violation of the student's constitutional rights. *Id.* at 359. The school board argued it was immune from suit under Florida's sovereign immunity law. *Id.*

This Court granted review and described the issue presented as follows:

> The question in this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

Id. at 358-59. The Court determined that the school board could not assert the sovereign immunity defense when the defense would not be available in federal court. *Id.*

The Court did not hold, as Quill asserts, that state court jurisdiction over section 1983 claims is mandatory absent congressional ouster or a valid excuse. *Howlett* stands for the proposition that plaintiffs must be as free to bring section 1983 claims in state court as in federal court. This rule was created to "assure that the outcome of federal causes of action would be the same, regardless if decided in a state or federal forum." *Greenwich Township v. Murtagh,* 601 A.2d 1352, 1355 (Pa. Commw. Ct.), *appeal granted,* 606 A.2d 904 (Pa. 1992).

The disposition of Quill's section 1983 claim here is the same as it would have been if Quill had attempted to bring a section 1983 action in federal court. Quill could not have brought a section 1983 action in federal court to challenge the constitutionality of the North Dakota tax statute at issue in this litigation. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100 (1981). Quill would be required to pursue its claim through its plain, adequate, and complete remedies at state law.[2] *Id.* at 116.

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[2] Quill concedes that the state declaratory judgment act provides a plain, speedy, and efficient remedy under state law and that a section 1983 action in federal court would be barred by the Tax Injunction Act. App. 5.

This is the same result the North Dakota Supreme Court reached below.

The case presented here is more like *Will v. Michigan*, 491 U.S. 58 (1989), than *Howlett*. *Will* established that the state and arms of the state, which enjoy Eleventh Amendment immunity from section 1983 suits for damages in federal court, are also exempt from section 1983 suits for damages in state court. *See Howlett*, 496 U.S. at 365. As a result of the decision in *Will*, the outcome of a suit for damages against the state and state officials in their official capacities is the same in state and federal court. In *Howlett* the defendants were a school district and local officials who could have been sued under section 1983 in federal court. *Howlett*, 496 U.S. at 359, 365-66. The Florida sovereign immunity law struck down in *Howlett*, therefore, would have resulted in different outcomes in state and federal courts. In contrast, the North Dakota Supreme Court's decision ensures consistent outcomes in state and federal court.

The North Dakota Supreme Court decision promotes the principle of uniform application of section 1983 in state and federal courts; that uniformity is the foundation for this Court's decisions in *Howlett*, *Will*, *Fair Assessment*, *Felder v. Casey*, 487 U.S. 131 (1988), and *Wilson v. Garcia*, 471 U.S. 261 (1985).[3] The decision below applies this

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[3] The decision below also does not conflict with *Dennis v. Higgins*, 111 S. Ct. 865 (1991). The only issue addressed in *Dennis* was whether suits for violations of the Commerce Clause may be brought under section 1983. *Id.* at 867. The majority opinion in *Dennis* does not discuss or decide whether the state court in *Dennis* properly assumed jurisdiction over the section 1983 claim. *See id.* at 880 (Kennedy, J., dissenting).

principle to the state tax challenge in this case and is consistent with the holding and rationale of *Howlett* and related Supreme Court decisions.

II. THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED BY THE PETITIONER.

In its petition for writ of certiorari, Quill has phrased the question presented as follows:

> Does the Tax Injunction Act, 28 U.S.C. § 1341, prohibit a state court of competent jurisdiction from entertaining a cause of action under 42 U.S.C. § 1983 in a case involving state taxation?

Cert. Pet. at i. Granting certiorari in this case would not answer this question.

The Tax Commissioner has never argued and the North Dakota Supreme Court did not find that the Tax Injunction Act applies to state court proceedings. Although the principles that underlie the Tax Injunction Act provided support for the North Dakota Supreme Court's decision, the primary basis for that decision was the policy of uniformity in the application of federal law in state and federal courts. *See* App. 4-5, 10-14. This case, therefore, does not present the question of whether the Tax Injunction Act prohibits a state court from entertaining a section 1983 claim in a case involving state taxation.

An additional reason for denying the petition is that this case is not as procedurally straightforward as Quill would have the Court believe. Quill did not initiate this action. After Quill refused to register as a retailer and

begin collecting North Dakota use tax on sales made to its North Dakota customers, App. 119-22, the Tax Commissioner filed a declaratory judgment action asking the district court to determine whether enforcement of the statute against Quill would violate the United States Constitution, App. 116-19. Quill answered and as an affirmative defense alleged that the state tax statute was unconstitutional as applied to Quill. App. 123-33. Quill also counterclaimed, raising these same allegations of unconstitutionality to claim attorney's fees under sections 1983 and 1988. *Id.*

No lower court has reached the issue of whether Quill's counterclaim stated a section 1983 cause of action. Disposition of Quill's section 1983 counterclaim on the merits was never necessary because the constitutionality of applying the North Dakota tax statute to Quill was resolved as part of the state declaratory judgment proceeding and appeals.[4] Deciding whether Quill is entitled to attorney's fees under section 1988, thus, would be premature.

These circumstances further demonstrate that this case is not ripe for review. A claim of a constitutional

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[4] As Quill conceded, the remedy provided by North Dakota's Declaratory Judgment Act is a plain, speedy, and efficient state law remedy. App. 5. Quill received the opportunity to present all constitutional claims and a determination that North Dakota could not impose a use tax collection obligation on Quill, i.e., all the relief that could be granted. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981). The only other advantage Quill sought by filing the section 1983 counterclaim was the possibility that, if successful, attorney's fees could be awarded pursuant to section 1988.

violation is not ripe until there has been an actual, concrete injury. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985). Because no tax assessment has been made or taxes paid, Quill has not suffered any property deprivation or other constitutional injury giving rise to a section 1983 cause of action.

Also, Quill concedes that a taxpayer must exhaust administrative remedies before bringing a section 1983 claim in state court. *Cert. Pet.* at 14. Yet, Quill asks the state court to exercise jurisdiction even before an assessment has been made. An assessment is necessary before a taxpayer is entitled to an administrative proceeding. *See* N.D. Cent. Code §§ 57-39.2-15 and 57-39.2-16; *see also* N.D. Cent. Code ch. 28-32. It is inconsistent to both acknowledge that there is an exhaustion requirement and assert that state remedial proceedings can be avoided just by filing a section 1983 claim anytime before a constitutional deprivation has occurred.

Finally, the unique procedural posture of the parties in this case could result in any decision by this Court being applicable only to the parties in this litigation. Courts have recognized that a defendant asserting a section 1983 claim raises special questions. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) ("[A] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant."); *State v. Maine State Trooper's Ass'n*, 491 A.2d 538 (Me.), *appeal dismissed*, 474 U.S. 801 (1985) (a counterclaim does not convert a successful section 1983 claimant into a plaintiff for determining the standard under which attorney's fees are to be awarded

under section 1988). A decision here would not necessarily be applicable to suits in which taxpayers were plaintiffs in state court actions or even to cases in which taxpayers actually had been assessed or paid taxes.

Accordingly, the case at bar does not squarely raise the issue Quill asks this Court to resolve, or provide an appropriate case in which to consider that issue.

CONCLUSION

For the reasons set forth above, the State of North Dakota respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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No. 93-11

In the

Supreme Court of the United States

OCTOBER TERM, 1993

QUILL CORPORATION,
Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS COMMISSIONER,
ROBERT E. HANSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICUS CURIAE DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

The Direct Marketing Association ("DMA"), pursuant to Supreme Court Rule 37.2, submits this brief as *amicus curiae* in support of the Petition for Certiorari filed by Quill Corporation ("Quill"). DMA has obtained the written consent of both parties to this case.

DMA, a not-for-profit corporation, is the oldest and largest trade association representing companies which are involved in direct-to-the-consumer mail advertising and marketing. DMA's membership exceeds 3200 firms located in all 50 states and 40 foreign countries. The majority of DMA's members are smaller companies. Approximately 85% have annual sales of $10 million or less. Approximately 20% employ fewer than 4 people, including "mom and pop" operations that continue to prepare their catalogs on kitchen tables. Most of DMA's members sell exclusively by means of interstate commerce — sending catalogs and other advertising materials by the United States Mail, receiving orders by mail or telephone, and delivering goods by interstate common carriers.

DMA members, large and small, have relied upon a long line of United States Supreme Court cases, including *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), and, more recently, *Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904 (1992) ("*Quill I*"), to protect them from being forced to collect use taxes by states in which they have no physical presence (or "nexus"). These cases establish that such use tax collection demands violate the rights of DMA's members under the Commerce Clause to the United States Constitution. However, despite this clear precedent, DMA members that lack nexus nonetheless continue to be targets of aggressive campaigns by state tax officials to compel them to collect and remit use taxes. These demands are often based upon far-fetched theories of nexus which are at odds with both the *National Bellas Hess* and *Quill I* cases.

Yet, in a practical sense, most DMA members are effectively foreclosed from defending their constitutional rights if they are denied the opportunity, under 42 U.S.C. § 1988, to recover reasonable attorney's fees and expenses. Of equal importance, if states can avoid exposure to attorney's fees under § 1988, no matter how egregious their unconstitutional acts may be,

there will be no meaningful deterrent to their bold, intimidating, and costly demands.[1] Because DMA's members, as nonresidents, make politically appealing targets for tax assessments, the need for the deterrent effect of attorney's fees awards is especially critical.

DMA, therefore, supports Quill's request for certiorari. Indeed, DMA believes that summary reversal would be appropriate.[2] Allowing the North Dakota decision to stand — in conflict with clear United States Supreme Court precedent — would also be a staggering blow to DMA's membership. It would also result in totally inconsistent state court opinions persisting on this critical issue. The gravity of the situation facing DMA's members is underscored by the fact that there are still over 30 states with sales and use tax statutes on their books which are flatly unconstitutional under the *National Bellas Hess* and *Quill I* nexus standard. Revenue officers in

[1] The methods by which states attempt to force mail order companies to collect use taxes are especially unseemly. Use taxes are owed, in the first instance, by in-state residents who purchase goods from out-of-state retailers. However, nonresident mail order companies are frequently threatened with direct liability for those taxes if they refuse to collect them for the state. State revenue departments approach mail order companies and demand that they commence collection of use taxes under the threat of an assessment for previous uncollected taxes. The cost of refusing such demands could be staggering since, in most states, no statute of limitations applies and use tax assessments frequently cover periods of six years or more. *See Quill I*, 112 S.Ct. at 1916 n.10. Confronted with an assessment, the mail order company, in order to gain access to state court, usually first must pay the assessment, plus interest and penalties. By the same token, the costs of caving in to state tax collection demands are extraordinary as well. *See Quill I*, 112 S.Ct. at 1913 n.6. The untenable position of DMA's members is made still worse by numerous interstate compacts which often result in coordinated, multi-state use tax collection demands and assessments.

[2] Although uncommon, summary reversal is appropriate in "situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). As discussed herein, the decision below plainly misconstrued the Court's precedent in *Howlett* v. *Rose*, 496 U.S. 356 (1990), which established that state courts are obligated to hear properly presented claims under § 1983.

those states frequently argue — even after the Court's decision in *Quill I* — that they are bound to enforce those statutes until they are repealed by their state's legislature or invalidated by a court of law. As a result, DMA members face the specter of costly state-by-state battles to rid state tax codes of such unconstitutional provisions — a war which only the largest mail order companies can afford.

If the mail order industry is to continue providing the opportunity for start-up entrepreneurs and small businesses to gain access to a national marketplace, those retailers must have some protection from the withering effect of unconstitutional use tax collection demands. DMA submits that § 1988 was intended to make such protection available through the courts to all litigants, including those of modest means. The decision of the Supreme Court of North Dakota, however, places such protection beyond the reach of most DMA members.

REASONS FOR GRANTING THE WRIT

I. IMPORTANT QUESTIONS OF FEDERALISM ARE RAISED BY NORTH DAKOTA'S REFUSAL TO PERMIT ENFORCEMENT OF 42 U.S.C. § 1983 IN STATE COURT.

The court below improperly discriminated between state and federal claims: it adjudicated Quill's claim for declaratory relief under a state declaratory judgment statute, but refused to allow a claim for declaratory relief and attorney's fees under 42 U.S.C. §§ 1983 and 1988 (1988). The Supremacy Clause forbids such discrimination. U.S. Const., Art. VI, cl. 2. It is important for this Court to make clear to the many state courts which already have considered this issue — or will in the future

— that they cannot "dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superiority of its source." *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

Indeed, DMA believes that summary reversal would be appropriate here. The law in this area is well-settled. In *Howlett*, this Court resolved a persistent conflict concerning whether states were required to hear claims under 42 U.S.C. § 1983. In ruling that they must hear such claims, the Court explained that "[t]he Supremacy Clause makes [the Constitution and the laws passed pursuant to it] 'the supreme Law of the land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett*, 496 U.S. at 367. Thus, the Court in *Howlett* invalidated a Florida rule of law which conferred immunity on state government entities from federal civil rights actions, holding that "the Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375. A routine application of *Howlett* v. *Rose* invalidates the decision below.[3]

A. *A State Court Cannot Decline Jurisdiction Over Federal Claims If the Parties Are Properly Before It and It Has Authority To Grant the Requested Relief.*

"[W]here the same type of claim, if arising under state law, would be enforced in state courts, the courts are not generally free to refuse enforcement of the federal claim." *Martinez* v. *California*, 444 U.S. 277, 284 n.7 (1980). The suggestion that

[3] It should be noted that this Court declined to grant certiorari in the recent case of *Huddleston* v. *Bloomingdale's By Mail Ltd.*, 848 S.W.2d 53 (Tenn. 1992), *cert. denied*, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993). In *Bloomingdale's*, the Supreme Court of Tennessee held that adjudication of § 1983 cases in state court tax cases was mandatory, a conclusion which is in stark contrast to the decision below.

state courts may discriminatorily refuse jurisdiction over federal claims — including those arising under 42 U.S.C. § 1983 — is "quite inadmissible." *Testa* v. *Katt*, 330 U.S. 386, 392 (1947) (quoting *Mondou* v. *N.H. and H.R. Co.*, 223 U.S. 1, 57 (1912)). *See also Howlett* v. *Rose*, 496 U.S. at 378-79 (1990) (where a state court has general jurisdiction over state actors and has authority to provide the remedies which are sought, adjudication of claims under 42 U.S.C. § 1983 is mandatory).

In this case, North Dakota's failure to recognize the superior authority of federal law is inexcusable. State courts cannot decline jurisdiction over a federal claim unless that dismissal results from the invocation of a neutral rule which applies to state and federal claims alike. As the Court observed in *Howlett* v. *Rose*:

> [o]n only three occasions have we found a valid excuse for a state's refusal to entertain a federal cause of action. Each of them involved a neutral rule of judicial administration. In *Douglas* v. *New York, N.H. and H.R. Co.*, the state statute permitted discretionary dismissal of both state and federal claims where neither the plaintiff nor the defendant was a resident of the forum state. In *Herb* [v. *Pitcairn*], the city denied jurisdiction over a FELA action on the grounds that the cause of action arose outside of its territorial jurisdiction. Although the state court was not free to dismiss the federal claim 'because it is a federal one,' we found no evidence that the state court 'construed the state jurisdiction and venue laws in a discriminatory fashion.' Finally, in [*Southern Ry. Co.* v.] *Mayfield*, we held that a state court could apply the doctrine of *forum non conveniens* to bar adjudiciation of a FELA case if the state 'enforces its

> policy impartially so as not to discriminate against Employers' Liability Act suits.'

496 U.S. at 374 (citations omitted).

Unlike the three cases identified by the Court in *Howlett*, the Supreme Court of North Dakota's refusal to allow a federal claim was not "neutral" in any sense of the word. Indeed, the court made no pretense of neutrality: "We do not read *Howlett* and earlier Supreme Court cases to require state courts to entertain § 1983 actions . . ." Appendix ("App.") at 12. This is precisely the kind of discriminatory practice which this Court has consistently condemned as contrary to the requirements of the Supremacy Clause. *See, e.g., Martinez* v. *California*, 444 U.S. 277, 284 n.7 (1980). A state court which has jurisdiction over "state common law or statutory law" claims, but "declines jurisdiction over federal actions for constitutional violations by the same persons . . . flatly violates the Supremacy Clause." *Howlett* v. *Rose*, *supra*, 496 U.S. at 380-81.

B. *The Federal Tax Injunction Act Does Not Permit States To Discriminate Against Claims Under 42 U.S.C. § 1983.*

The court below seeks to justify its discriminatory treatment of federal claims by reasoning that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), either directly or by implication, permits state courts to discriminate against § 1983 tax claims. There is no legitimate authority for this position.

First, the Tax Injunction Act, by its very terms, places limits on the ability of federal courts — not state courts — to hear cases involving challenges to state taxation, whether such challenges arise under § 1983 or otherwise. The purpose of this statute is to allow state courts to adjudicate such controversies to the fullest extent possible; it was never intended to limit the availability of federal claims in state court. *See, e.g.*,

Rosewell v. *LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1991) (the Tax Injunction Act embodied "Congress' decision to *transfer* jurisdiction" over federal claims from the federal district courts to the state courts) (emphasis added).

There is nothing in the legislative history of the Tax Injunction Act which suggests that it was intended to limit the availability of § 1983 actions in state court.[4] "The text of the Act, which refers only to the federal district courts, makes clear that it is merely a jurisdiction-shifting provision. . . . The legislative history and narrow focus of the Tax Injunction Act also make clear that the Act was not a congressional preemption of the remedies provided by § 1983 in the area of state taxation." Taylor, "Section 1983 in State Court: A Remedy for Unconstitutional State Taxation," 95 Yale L.J. 414, 419 (1985).[5]

The limited effect of the Tax Injunction Act must also be contrasted with the broad scope which Congress intended for § 1983. This Court has "repeatedly held that the coverage of [§ 1983] must be construed broadly," *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 105 (1989) (citations omitted), and that "[t]he legislative history of the section also stresses that as a remedial statute, it should be 'liberally and

[4] For example, Senator Bone, the act's primary sponsor, introduced the bill that became the Tax Injunction Act by saying that the "proposed amendment would affect *the jurisdiction of the district courts*," not the state courts. 81 Cong. Rec. 1415 (1937) (emphasis added). The House and Senate reports confirm that the act was not intended to foreclose taxpayer access to rights based upon federal law. *See* H.R. Rep. No. 1503 at 2 ("the bill does not take away any right of the taxpayer or deprive him of his day in court . . .").

[5] It is noteworthy that federal courts will readily hear § 1983 cases involving state taxation where the requirements of the Tax Injunction Act are not satisfied. For example, in *Direct Marketing Association, Inc.* v. *Bennett*, the United States Court of Appeals for the Ninth Circuit reversed a district court decision which dismissed DMA's case on the basis of the Tax Injunction Act. 916 F.2d 1451 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1683 (1991). The Ninth Circuit ruled that federal court prosecution of a § 1983 tax claim *could* go forward because of uncertainty over whether DMA would be able to assert its claims in state court. 916 F.2d at 1457.

beneficently construed." *Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) (quoting *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 865, 868 (1978)). The reach of § 1983 is "broad and unqualified." *Dennis* v. *Higgins*, 498 U.S. at 443 n.4.

To allow a jurisdiction-shifting statute like the Tax Injunction Act to eviscerate § 1983 — either directly or indirectly — would unfairly constrict the scope of § 1983, which was intended to be "broadly construed" to provide protection against "all forms of official violation of federally protected rights." *See Dennis* v. *Higgins*, 436 U.S. at 869 (quoting *Monell, supra*, 436 U.S. at 700-01)).

II. The Court Should Intercede to Reconcile Sharply Conflicting State Court Decisions.

Unless this Court summarily reverses the decision below or grants certiorari, tax case litigants, including DMA's members, face a sharp conflict among state courts regarding whether lawsuits challenging state revenue department actions may be maintained under 42 U.S.C. § 1983 — and, *a fortiori*, whether attorney's fees are available to successful state court litigants under § 1988. There simply is no disciplined consensus among the various state courts on this fundamental question of federalism. By granting certiorari, the Court can settle this issue and introduce sorely needed consistency, predictability, and fairness into the handling of federal claims in state tax cases.[6]

Cases starkly at odds with the decision below include: *Bloomingdale's By Mail Ltd.* v. *Huddleston*, 848 S.W.2d 52 (Tenn.

[6] Justice Kennedy astutely observed, in his dissent in *Dennis* v. *Higgins*, that the question of whether state tax claims under § 1983 must be recognized in state court is one of "paramount importance." 498 U.S. at 465. Petition at 11.

1992), *cert. denied*, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993) (awarding attorney's fees under § 1988 in state tax case after ruling that "a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights"); *Marx* v. *Truck Renting & Leasing Association*, 520 So.2d 1333, 1346 (Miss. 1987) ("the absence of federal jurisdiction . . . open[s] the door to the state courthouse so that the taxpayer may there assert his § 1983 claim"); *Allison* v. *Board of County Commissioners of Johnson County*, 737 P.2d 6, 11-12 (Kan. 1987) ("Congress' purpose in adopting [§ 1988] was to assure that the opportunity to enforce federal civil rights would be available to all.") *See also Hogan* v. *Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992) (holding that state courts "must entertain sec. 1983 claims," but requiring exhaustion of state administrative remedies "before commencing a sec. 1983 claim" in state court); *Nutbrown* v. *Munn*, 811 P.2d 131, 138 (Or. 1991), *cert. denied*, 112 S.Ct. 867 (1992).

Cases which have sided with the Supreme Court of North Dakota, all of which *preceded* this Court's decision in *Howlett* v. *Rose*, include: *Ziska* v. *Water Pollution Control Authority*, 490 A.2d 509 (Conn. 1985); *Stuffelbaum* v. *Panethiere*, 691 S.W.2d 271 (Mo. 1985); *Spencer* v. *South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided Court*, 471 U.S. 82 (1985) (per curiam); *Backus* v. *Chivilis*, 224 S.E.2d 370 (Ga. 1976).

Absent resolution of this conflict by either summary reversal or plenary review, the decision below and the Tennessee court's decision in *Bloomingdale's* will stand at opposite ends of a spectrum of decisions that will inevitably develop. Furthermore, if this case is neither reversed nor reviewed, a strong signal will be sent to state courts that they may discriminate against federal causes of action as long as they articulate a state policy for doing so. The Court should not allow such confusion to develop.

III. The Potential For An Award of Attorney's Fees Is Necessary to Ensure That Tax Officials Respect the Constitutional Rights of Small Businesses, Including Direct Marketers.

It is well-settled that the fee award authorized by § 1988 is "an integral part of the remedies necessary to obtain compliance with § 1983." *Maine* v. *Thibotout*, 448 U.S. 11 (1980). The entitlement to a recovery of fees is most acute for the majority of DMA's members, who are relatively small retailers that cannot afford an expensive legal battle with state tax officials in state courts located far from their home offices. The constitutional rights protected by § 1983 should not be limited only to those companies which can afford to wage legal battles with state tax administrators; 42 U.S.C. § 1988 was intended to enable litigants of all kinds to defend their constitutional rights. Unless state courts are instructed that they must afford tax litigants full access to § 1983 actions in state courts, some states will effectively suppress constitutional challenges to their taxation schemes.

In use tax cases such as this — where declaratory or injunctive relief is sought — there is *no* likelihood of monetary recovery. Indeed, the very best that can be accomplished in a state use tax case is a refund of taxes, penalties, and interest which have already been paid. A majority of DMA members, if faced with the option of either collecting the tax or resisting the constitutionally suspect demands of state tax officials, would probably be forced to accede to the state demands because of the expense of litigation and the unavailability of compensatory damages for the high cost of use tax collection and remittance. Recovery of attorney's fees under § 1988 is imperative if such firms are to have any meaningful opportunity to enforce their rights.

The magnitude of the fees expended in the instant case present a stunning illustration of how, if left in place, the

decision below would put litigation beyond the reach of most DMA members. Mail order companies can reasonably expect to incur such substantial costs in every jurisdiction where they elect to resist questionable use tax collection demands. Tax officials are keenly aware of the leverage they possess over small and distant companies if attorney's fees cannot be recovered, as well as the concomitant lack of risk to themselves from making their demands — no matter how unreasonable those demands may be.

CONCLUSION

This case presents an important question of federalism and results in a serious conflict among state courts which warrants the Court's attention. The underlying legal principles as well as the equities of this case support summary reversal or, in the alternative, the granting of Quill's petition. Faced with corporate and perhaps personal liability[7] for uncollected use taxes, the enormous burden of collecting state and local taxes, and the specter of millions of dollars in legal fees incurred in multiple lawsuits across the country, DMA's members, especially those smaller companies which constitute the bulk of its membership, need the § 1988 entitlement to attorney's fees as a means of asserting effectively their constitutional rights and deterring the overreaching enforcement efforts of state tax officials.

[7] Numerous states have statutes which make owners, officers, and managers personally liable for use taxes which their companies fail to collect, and provide for the imposition of criminal penalties in such cases. *See, e.g.*, Ch. 60, Art. 28, New York Tax Law ("NYTL") § 1145(e); Ch. 60, Art. 37, NYTL § 1817(c). Several states have threatened to enforce these statutes against individuals associated with direct marketing companies.

For the reasons stated herein, DMA asks the Court to summarily reverse the decision below or, in the alternative, grant Quill's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 93-11

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Supreme Court of the United States

October Term, 1993

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA, by and through its Tax Commissioner, Robert E. Hanson,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents attach great significance to their use of a procedural shortcut in this case. The Tax Commissioner did not issue an assessment of use tax against Quill but chose to proceed directly to court, requesting the entry of an order:

> [t]hat Quill is a "retailer" and a "retailer maintaining a place of business in this state." The State also requests executory relief to require Quill to obtain a North Dakota sales and use tax permit and collect and remit all tax, penalty and interest due from July 1, 1987.

Appendix ("App.") at 118.[1] Respondents allege that this procedure distinguishes the decision below from the other state supreme court decisions addressing the question of whether state courts are required to entertain § 1983 claims in state tax cases. Respondents' Brief at 4-8. Respondents also claim that because the Tax Commissioner went directly to court, Quill's Commerce Clause rights have not been violated. Respondents' Brief at 12-13. Finally, and incomprehensibly, Respondents complain that Quill attempted to avoid the requirement that it exhaust its administrative remedies by raising its § 1983 claim as a response to the Tax Commissioner's judicial enforcement action. Respondents' Brief at 13.

Respondents' claim that this case is distinguishable from *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992), cert. denied, ___ S.Ct. ___, 66 U.S.L.W. 3850 (June 21, 1993), petition for rehearing filed August 9, 1993, is specious. As the petition for rehearing in *Bloomingdale's* correctly recognizes, the decision of the Supreme Court of North Dakota is "in direct conflict with the decision of the Tennessee Supreme Court". Petition for Rehearing at 1.[2]

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[1] The suit was filed July 7, 1989. App. at 118. Thus the Tax Commissioner was demanding the payment of two years taxes.

[2] Respondents reading of *Allison v. Board of County Commissioners of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987) is also in error. Respondents' Brief at 7. The court stated as follows regarding the obligation to hear § 1983 actions

> The principles of comity and the Tax Injunction Act, 28 U.S.C. § 1341 (1982), prevent actions in the federal courts based on a claim of unequal taxation of property by a state. If a § 1983 claim exists due to a state's

That Quill raised its § 1983 claim by way of a counterclaim to the Tax Commissioner's judicial enforcement action rather than as a plaintiff challenging a tax assessment has absolutely no relevance to the merits of Quill's § 1983 claim. Quill's § 1983 claim is based upon the Tax Commissioner's enforcement of an unconstitutional state law. This enforcement, regardless of the procedure chosen, gives rise to liability under 42 U.S.C. § 1983 and an award of fees under 42 U.S.C. § 1988.

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), involved a challenge to rules of the Virginia State Bar which prohibited legal advertising. The plaintiffs sued, among others, the Virginia Supreme Court, the Virginia State Bar and the Chief Justice of the Virginia Supreme Court in his individual and official capacities. The plaintiffs ultimately prevailed on their claim that the advertising restrictions were unconstitutional and then moved for attorney's fees.

The District Court awarded attorney's fees against the Virginia Supreme Court and the Chief Justice in his official capacity. However, the court concluded that special circumstances made it unjust to award attorney's fees against the Virginia State Bar, pointing out that the State Bar had actually attempted to assist in eliminating the advertising restrictions.

> unequal taxation or unequal assessment of property, the action must be brought in the state court. Fair Assessment in *Real Estate Assn. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981).

737 P.2d at 11-12.

The issue before this Court in *Consumers Union* was whether attorney's fees could be recovered from the Virginia Supreme Court and the Chief Justice. The Court found that the Virginia Supreme Court and the Chief Justice were not liable for attorney's fees because of legislative immunity. The Court then said the following regarding the Virginia State Bar:

> We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.

446 U.S. at 739. The Tax Commissioner acted to enforce the unconstitutional "anti-*Bellas Hess*" statute enacted by the North Dakota legislature. Having done so, his office is liable for attorney's fees under 42 U.S.C. § 1983 and § 1988.

When it enacted 42 U.S.C. § 1988 in 1976, Congress anticipated the award of attorney's fees to a party which challenges the constitutionality of a state law as a defendant rather than as a plaintiff. The Senate Report stated:

> In the large majority of the cases the party or parties seeking to enforce such rights [protected by the statutes enumerated in section 1988] will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g. *Shelley v. Kramer,* 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948).

S. Rep. No. 94-1011, 94th Cong., 2d Sess., at 4. [Bracketed material added] The citation to *Shelley v. Kraemer* is significant. In that case the plaintiff sued to enforce a racially restrictive real estate covenant. The Shelleys, as defendants, successfully objected to enforcement on constitutional grounds. Congress' citation of *Shelley*, makes it clear that a party which successfully defeats an enforcement action on constitutional grounds is entitled to an award of attorney's fees in the same manner as a prevailing plaintiff. See *Kirchberg v. Feenstra*, 708 F.2d 991, at 996 (5th Cir. 1983) and cases cited therein. Quill successfully defeated the Tax Commissioner's enforcement action on constitutional grounds and is entitled to attorney's fees under 42 U.S.C. § 1988.

Petitioner respectfully requests this Court to grant a Writ of Certiorari and reverse the decision of the North Dakota Supreme Court.

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